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THE

LAW OF EVIDENCE

IN

BRITISH INDIA.

BY

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FIFTH EDITION.

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PREFACE TO THE FIFTH EDITION.

In this edition of this work the text of Act I of 1872 has been printed as amended up to date. The rulings on the Law of Evidence up to nearly the end of 1893 have been incorporated in the Notes under each section. A few very recent rulings that have come on while the work was passing through the Press will be found in the "Addenda."

The Bankers' Evidence Act (XVIII of 1891), as amended by Act I of 1893, is printed after Act of 1872 (*vide* pp 680—683).

For the benefit of those who are not familiar with this work, it may be mentioned that the subject of *res judicata* is discussed at considerable length in the Note under section 40 (*vide* pp. 235—314); that a note on the Law of Registration will be found at pp. 443—459; and that the Indian Oaths Act (X of 1873) is printed *in extenso* at pp. 621—624.

January, 1894.

PREFACE TO THE SECOND EDITION.

THIS is rather a new book than a new edition, the contents having increased three-fold, and the matter of the first edition (so far as it is now relevant) having been recast in a new shape. A Code of Evidence, constructed with special reference to the requirements of the country, has now been substituted for the former fragmentary and unsatisfactory state of the law described at pages 15—17 of the following *Introduction*.[1] So important a change in the subject-matter of the work has necessitated a change in the plan and object of the work itself. This plan and object may now be thus described.

The Evidence Act, like every Code, consists of a number of abstract rules. In order to understand fully these rules, a knowledge of principles is required, which cannot be conveyed by the provisions of an Act of the Legislature, and which must be acquired from sources *dehors* any such Act. The meaning, the object, the proper application of a rule will be better and more fully comprehended in proportion as the origin, the development, and the history of the principles upon which it is founded are known and understood. Acquaintance with the stages through which it has passed, and the alterations to which it has been from time to time subjected, can alone account for and explain its present shape and the language in which it has been finally promulgated. Every word of the abstract proposition in which it is expressed has been deliberately chosen with reference

[1] See paragraphs 11—14 of the Introduction to the present edition.

to some decided case, to some doubt that has been raised and solved, to some improvement introduced, to some alteration deliberately made. I have endeavoured in the following pages to supplement the Act itself with this information so necessary to its full comprehension. The Act has been expressly based upon the English Law of Evidence, modified to suit the requirements of India. I have referred to English cases to explain the origin and nature and development of the principles of the English law—I have referred to Indian cases to show where and why these principles have been modified in applying them to India. If I have gone somewhat further and referred very largely to cases decided by the Privy Council and by the highest Courts in India upon matters in respect of which the new Act has expressly promulgated a rule before tacitly followed, rather than introduced any change, or upon matters which a scientific treatment might put aside as not properly belonging to the province of *Evidence*, I trust that my unscientific dealing with the subject will find with my critics some apology in the light thrown by these *surrounding circumstances* upon the subject itself. In truth, I have willingly sacrificed the scientific to my conception of the useful. The student who comes to read with a previously acquired stock of English knowledge only, will, I trust, find the advantage of having this knowledge placed in juxtaposition with Indian things and Indian cases, which will be the more readily understood by means of this juxtaposition, and the light thus struck by comparison. The native of India, who is not conversant with the English system on which the Act is based, and by whom therefore the abstract language of the Act must be less readily comprehended, will, I hope, be materially assisted by having this abstract language applied to and explained by things and cases which he does understand. The judicial functionary of some standing who may have dreaded the, to him, difficult task of unlearning the old and learning the new, will be, perhaps, surprised to

find how very little of what is really new the Act contains; and how much consists of 'old friends with new faces.' The most important changes which he will find—and these can be to him no unpleasant ones—are that rules, which were before followed doubtfully and without authority, are now authoritatively laid down for his assistance and guidance—and that system and method and uniformity have been substituted for confused and isolated rules of uncertain and doubtful application. I have endeavoured to explain and illustrate each principle involved with sufficient fulness to make the work sufficiently elementary in character to suit the requirements of those who approach the subject for the first time and without any previous acquaintance therewith.

The second section of the Evidence Act expressly saves *the provisions of any Statute, Act, or Regulation in force in any part of British India and not expressly repealed by the Evidence Act itself.* I have endeavoured to include in this volume all outstanding rules of evidence thus expressly saved and to be found scattered through the Acts of Parliament applicable to India, the old Regulations, the Acts of the Supreme Legislative Council of India, and the Acts of the Local Legislative Councils of Bengal, Madras, and Bombay. A glance under the titles, ACT, REGULATION, STATUTE, in the Index will give an idea of the extent of the work done in this direction. I have some confidence that nothing has been omitted, though it may be that I have included somewhat that, in the opinion of some, might as well have been left out. The text of the Act has been reprinted with the greatest care from the copy published in the *Gazette*. The amendments made by Act XVIII of 1872 have been introduced into the text, which can therefore be depended upon as containing the law exactly as it stands at the time of the publication of this edition.

The Indian Evidence Act is one of the latest additions to that body of codified law, the first portion of which, *viz.*

"*The Code of Civil Procedure*" (codification of adjective civil law), was enacted in 1859. *The Indian Penal Code* (codification of substantive criminal law) followed in 1860. *The Code of Criminal Procedure* (codification of adjective criminal law) was first passed in 1861, and has been re-enacted in an amended and improved form in 1872. Portions of substantive civil law have been codified in "*The Indian Succession Act*, 1865," "*The Indian Divorce Act*, 1869," and "*The Indian Contract Act*, 1872." The work that is thus being done in British India will hereafter form an important page in the history of Great Britain, and its effects will, in all human probability, re-act upon England herself. When Rome allowed the Prætor's edict to modify and temper the *jus civile* with the broader principles of the *jus gentium*, making a necessary concession to her own progress and to the wants of the many new citizens, which were added to her ever-widening circle, she laid the real foundation-stone of that grand structure which has outlived the ruin and fall of her material empire. The *jus honorarium*, offspring of the union of the *jus civile* and the *jus gentium*, not only fulfilled the requirements of its own time and nation, but also generated that system of law which to this day exercises its influence upon Europe. So it may well be that the work which England is doing in India will in time re-act upon herself and bring about that simplification and codification which have been long spoken of, but the accomplishment of which has been beset by difficulties hitherto insuperable. If this result is ever to be realized, and if it is to be at all attributable to the success of the Indian Codes, that success must be indubitable. In order to achieve such a success, the Codes must be administered by men whose education in law is not merely limited to the letter of the Codes themselves.
rule itself will be often misunderstood where the reason of the rule is not known. Those will best understand and apply the rule who know the object and intention with which it

was framed, and with which the language in which it is expressed was selected. Language, like other things human, is imperfect; and how great soever be the precision with which it is chosen, however superior be the skill of the draftsman, the language of every Code needs to be supplemented by the knowledge just described, and the mind of the reader to be trained by the study thereof. The following pages are an attempt to put this knowledge in an accessible shape and so contribute to the end indicated, so far as concerns one portion of the codified law of India.

C. D. F.

April, 1873.

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ADDENDA ET CORRIGENDA.

Page 45, line 13, from bottom, *after* "264" *add* "*Bhagwan Singh* v. *Khuda Baksh*, I. L. R., 3 All. 397; and *Kunhimmu* v. *Vigyathama*, I. L. R., 7 Mad., 535."

" 72, note 9, *for* "Tra" *read* "Tradition."

" 73, note 3, *after* "L. R., 3 I. A." *add* "176."

" 84, line 10, from bottom, *after* "702" *add* "But see *Queen-Empress* v. *Atagu Kone*, I. L. R., 16 Mad., 421."

" 85, line 9, from bottom *after* "Code" *add* "This has subsequently been dissented from in *Queen-Empress* v. *Ram Lall*, I. L. R., 15 All., 141."

" 86, line 7, from top, *after* "Act" *insert* "See also *Nityanand Kar* v. *Raj Ballabh Adyapurohit*, 25 W. R., 267."

" 86, line 10, from top, *add* as new para.: "A Collector acting in appraisement proceedings under ss. 69 and 70 of the Bengal Tenancy Act is a 'Court' and his sanction is necessary to the institution of proceedings under ss. 465 and 471, P. C., for offences under these sections alleged to have been committed before him: *Raghubans Sahai* v. *Kokil Singh*, I. L. R., 17 Calc., 872."

" 99, line 17, from top, *after* "1" *add* "I. L. R., 15 All., 261."

" 104, line 32, from top, *after* "1" *add* "I. L. R., 15 All., 261."

" 107, line 33, from top, *after* 408, *add* "In *Mohan Lall* v. *Nur Ahmed*, 1 N.-W. P., 116, it has been said that when a piece of land has been used from time immemorial by the inhabitants of a *mohulla* for burying their dead, such use excludes any claim to exclusive possession by the zamindar, which interferes with this use. But no reasons are given for this decision, and its correctness appears doubtful. The customary right claimed would seem to be bad for unreasonableness; for it would entirely destroy the rights of the zamindar in his own property."

" 110, line 10, from top, *after* "records" *add* "The object of a *wajib-ul-arz* is to supply a record of existing local custom: *Superunddhwaja Persad* v. *Garuddhwaja Persad*, I. L. R., 15 All., 147."

" 127, line 23, from top, *after* "683" *add* "See also *Venkata* v. *Partha Saradhi*, I. L. R., 16 Mad., 220."

Page 127, line 31, from top, *after* "385" *add* "*Bhasker Talya Shet* v. *Vijalal Nathu*, I. L. R., 17 Bom., 513."

,, 133, line 16, from top, *after* "165," *insert* "I. L. R., 7 Calc., 107."

,, 142, line 15, from bottom, *for* "ter" *read* "sister."

,, 144, line 29, from top, *after* "26" *add* as new para.: "A Police *patel* is a Police-officer within the meaning of ss. 25 and 26 of the Act, and a confession made to a Police *patel* is therefore inadmissible in evidence: *Queen-Empress* v. *Bhima*, I. L. R., 17 Bom., 485."

,, 161, line 2, from top, *after* "regard" *insert* "to."

,, 162, line 22, from top, *after* "424" *add* "and *Liakat Ali* v. *Kurimannissa*, I. L. R., 15 All., 396."

,, 192, line 9, from top, *after* "818" *add* "But in *Ram Chandra Dutt* v. *Jogeshwar Narain Deo*, I. L. R., 20 Calc., 758, *Haines* v. *Guthrie* was not followed, and it was held that in this country hearsay evidence is admissible to prove the date of a birth."

,, 218, line 31, from top, *for* "Co" *read* "Court."

,, 222, line 11, from bottom, *after* "52" *add* "*Sashi Bhushan Basu* v. *Girish Chandra Mitter*, I. L. R., 20 Calc., 940: (Entries in a register made under Bengal Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a statute, and certified copies of such entries are admissible for what they are worth.)"

,, 246, line 33, from top, *after* "setting" *insert* "it."

,, 255, line 5, from bottom, *after* "*judicata*" *add* "But see p. 263, and *Gobind Chandra Kundu* v. *Tarak Chundra Basu*, I. L. R., 3 Calc., 145; 1 C. L. R., 35; and *Gopal Das* v. *Gopi Nath Sirkar*, 12 C. L. R., 38."

,, 265, line 15, from top, *after* "question" *insert* "In *Bakshi* v. *Nizamudin*, I. L. R., 20 Calc., 505, it has been said that where in a rent-suit a Judge tries the question and gives judgment on the question 'what is the yearly rent,' and make that the foundation of his judgment, that becomes *res judicata* between the parties. See also note 7 to p. 255, *Gobind Chundra Kundu* v. *Tarak Chandra Basu*, I. L. R., 3 Calc., 145; 1 C. L. R., 35; and *Gopal Das* v. *Gopi Nath Sirkar*, 12 C. L. R., 38."

,, 269, line 30, from top, *after* "owners" *add* "*Chinnasami* v. *Hariharabadra*, I. L. R., 16 Mad., 380: (First suit under Guardians and Wards Act, 1890, in which a will was held to be a forgery; Second suit for probate under Probate and Administration Act, 1881.)"

,, 269, last line, at bottom of page, *after* "disapproved" *add* "and see *Phundi* v. *Jangi Nath*, I. L. R., 15 All., 327, in which *Partha saradi Ayyangar* v. *Chinnakrishna Ayyangar* was dissented from."

Page 291, line 1, from top, *after* "545" *insert* "*Bhukandas Vijbhukandas* v. *Lallubhai Kashidas*, I. L. R., 17 Bom., 562."

,, 296, line 11, from bottom, *after* "215" *add* "*Futteh Narain Chaudhri* v. *Chandrabati Chaudhrain*, I. L. R., 20 Calc., 560."

,, 333, line 5, from bottom, *after* "jurisdiction" *add* "See *Chinnasami* v. *Hariharabadra*, I. L. R., 16 Mad., 380.

,, 334, line 10, from top, *after* "grant" *add* "A grant of probate under Act V of 1881 does not make any question as to title to property or as to the construction of the will *res judicata*: *Arunamayi Dasi* v. *Mohendro Nath Wadadar*, I. L. R., 20 Calc., 388.

,, 337, line 4, from top, *after* "*aliunde*" *add* "See *Palakdhari Singh* v. *The Collector of Gorakhpore*, I. L. R., 15 All., 261."

,, 340, line 2, from top, *for* "*Rantu*" *read* "*Kantu*."

,, 344, line 22, from top, *insert* "to" *before* "the" at beginning of line.

,, 353, line 24, from top, *after* "character" *add* "is."

,, 395, line 2, from bottom, *for* "XIII" *read* "XII," and *for* "53" at end of line *read* "534."

,, 434, line 1, from bottom, *for* "how" *read* "show."

,, 466, line 20, from top, *for* "*am*" *read* "*ram*."

,, 472, line 20, from bottom, *insert* "18" *before* "W. R., 81."

,, 509, line 7, from bottom, *after* "title" *add* "See also the recent Privy Council case of *Ismail Arif* v. *Mahomed Ghous*, I. L. R., 20 Calc., 834."

,, 518, line 15, from top, *after* "illustration" *add* "See also *Wutzler* v. *Sharpe*, I. L. R., 15 All., 290."

,, 516, line 16, from top, *after* "190" *add* "And a person found in possession of stolen property identified as belonging to different owners, but which does not appear to have been received by him at different times, cannot be tried and convicted separately in respect of the property identified by each owner: *Queen-Empress* v. *Makhan*, I. L. R., 15 All., 317."

,, 543, line 3, from top, *insert* "36" in vacant space at commencement of the line.

,, 547, line 21, from top, *after* "533" *add* "The service of a notice of ejectment under s. 36, Act XII of 1881, is as between the person who causes such notice to be served and the person on whom it is served a conclusive admission by the former of the existence between them of the relation of landlord and tenant: and the landlord cannot afterwards sue in the Civil Court to eject the same tenant from the same land on the ground that he is not a tenant but a mere trespasser: *Baldeo Singh* v. *Imdad Ali*, I. L. R., 15 All., 189."

,, 591, line 7, from bottom, *for* "of" *read* "or," and in line 3 from bottom, *for* "or" *read* "of."

,, 601, line 1, *before* "the" at commencement of the line *insert* "if."

Page 616, line 16, from top, *after* "overruled," *add* "and in *Queen-Empress* v. *Matabadal*, I. L. R., 15 All., 392."

" 621, add as note to s. 4 (*a*) of the Indian Oaths Act: "A Magistrate acting under the Criminal Procedure Code, s. 159, has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting: *Queen-Empress* v. *Alagu Kone*, I. L. R., 16 Mad., 421."

" 629, line 19, from top, *for* "acts" *read* "facts."

" 675, lines 8 and 9, from top, *for* "ob-" "tion," *read* "objec-tion."

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N.B.—The names are arranged in the order of *plaintiff v. defendant* in Courts of Original Jurisdiction, and of *appellant v. respondent* in Courts of Appellate Jurisdiction. All such *prefixes* as the following have been omitted, *viz.*—Babu, Bahadur, Begam, Bibi, Chaudhri, Dewan, Haji, Maharajah, Mahomed, Mussamat, Mir, Mohant, Mulvi, Munshi, Nawab, Rajah, Rani, Saheb, Shah, Sheikh, Srimati, Syud, Thakur.

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INTRODUCTION

Functions of a Court of Justice.

§ 1. The functions of a Court of Justice are twofold, *viz.*, 1*st*, to ascertain the existence or non-existence of certain facts; 2*nd*, to apply the *substantive* law to ascertained facts and declare the rights or liabilities of parties in so far as they are affected by by such facts.[1] For example, in a criminal trial it must first be ascertained whether the prisoner committed certain acts or was guilty of certain omissions;[2] and, if it be shown that he did commit such acts or was guilty of such omissions, the Court proceeds to annex the legal consequence, *viz.*, declare him liable to a certain punishment. In a civil trial, in the same manner, the Court has first to ascertain whether the parties did certain acts, or whether a certain state of things[3] exists—as, for instance, whether the defendant executed a certain bond in favour of the plaintiff; or whether the plaintiff is the legitimate son of a certain person, and therefore rightful heir to certain property which he claims under the law of inheritance; or whether a certain house is out of repair, in respect of which damages are claimed from a tenant who has covenanted to keep it in repair; or whether a certain stream is fordable which separates accreted soil from the plaintiff's estate (see cl. 3, s. 4, Bengal Reg. XI of 1825). The execution

[1] I do not regard the *enforcement* of the rights or liabilities thus declared as one of the proper functions of a Court of Justice. In civil cases in India the officers of the Courts perform this duty, but it is really a ministerial duty.

[2] See section 32 of The Indian Penal Code.

[3] The definition of 'fact' in The Indian Evidence Act includes a 'state of things'—see section 3.

or non-execution of the bond, the state of repair or non-repair of the house having been established, the Court annexes the legal consequence, *viz.*, declares the defendant liable to pay or not to pay a certain amount of money. The fact of legitimate sonship, or the fordability or non-fordability of the river being proved or disproved, the Court declares that the plaintiff has or has not a right to the possession of certain property. If the facts of each case were undisputed, if there was no contention as to whether certain acts had been committed, or as to whether or not a certain state of things existed, the Court would merely have to apply the substantive law and to declare the consequences resulting from such application—a duty which, though it might occasionally present some difficulty, would in the great majority of cases be sufficiently simple. But men, through misinformation, mistake, misunderstanding and human imperfection, and occasionally from less excusable causes, seldom admit or are agreed about the *facts*, and the Court, before it can apply the *substantive* law, has to sift out from a mass of contradiction, misconception, error, often stupidity, and sometimes dishonesty, fraud and falsehood, the true *facts* to which the substantive law is to be applied. The means whereby the Court informs itself of the existence of these facts is called EVIDENCE.[4]

[4] "Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil, the object is to ascertain some right of property or of *status*, or the right of one party, and the liability of the other, to some form of relief. All rights and liabilities are dependant upon and arise out of *facts*, and facts fall into two classes, those which can, and those which cannot, be perceived by the senses."—*Report of the Select Committee on the Evidence Bill.*

"In order that the Judge may decide upon a question in litigation, it is necessary that the parties to the action should satisfy him of the truth of the *facts* submitted for his decision. But they must not only satisfy the Judge; they must also prove the *facts* adduced. Facts that must be proved, and such as affect and are relevant to the decision to be given are uncertain facts,—that is, such as are disputed by the other party."—*Modern Roman Law, by Tamkins and Jenchen*, p. 92.

§ 2. The word 'evidence' is derived from the Latin word '*evidens*,' '*evidere*,' which means "to show clearly; to make clear to the sight; to discover clearly; to make plainly certain; to ascertain; to prove." "Evidence," says Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other."—"The word evidence," says Mr. Taylor, "includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of *fact*, the truth of which is submitted to judicial investigation."—Unless the facts be correctly ascertained, however accurate be the application of the substantive law, the result cannot (except by mere chance) be free from error. The first and most essential step towards a right adjudication is therefore to ascertain the facts correctly. The value of rules which guide and assist in the performance of this duty must necessarily be very great, and thus we see the importance of the study of the Law of Evidence.

Meaning of the word 'Evidence.'

§ 3. Mr. Bentham has used the phrase '*substantive law*' to designate that law which the Courts apply to ascertained facts in order to frame a judgment; as opposed to those rules by which they proceed in order to bring before them the parties, their witnesses, their documents and other materials for adjudication—to ascertain the facts by questioning the persons and inspecting the things—to record their judgments and, if necessary, to enforce them. These last, or the rules of procedure, he has termed '*adjective law*.' What Mr. Bentham calls 'substantive law,' was styled in a report presented to the Prussian Government in 1811, '*material law*'; and what Mr. Bentham calls 'adjective law,' was there styled '*formal law*.' The former metaphor is drawn from the language of the *grammarians*; the latter from that of the *logicians*.[5] The "Indian Penal Code"

Substantive and Adjective Law.

[5] Substantive law, or the law which the Courts are appointed to administer, is called by the French lawyers *le fonds du droit*: adjective law, or the rules according to which the substantive law is to be administered,

(Act XLV of 1860, now amended by many subsequent Acts) is substantive law, and together with some other provisions contained in various *special*[6] and *local*[7] laws, forms the whole of the substantive criminal law administered in British India. The Code of Criminal Procedure (Act X of 1882) is, on the other hand, adjective law. So also The Code of Civil Procedure (Act XIV of 1882) is adjective law. The substantive Civil Law of British India has not as yet been codified. It is to be found in various Acts[8] of the Indian Legislature, in the Hindu and Mahomedan law;[9] and, for

Examples.

they call *la forme*. Mr. Austin does not like the phrases 'substantive law' and 'adjective law,' though he uses them largely in elucidating his own plan. His objection against them is that they suggest a wrong basis of division according to his very elaborate conception of what a scientific division should be—see Lectures xxxv and xlv, pp 611 and 788 of edition of 1869 by Mr. Robert Campbell.

[6] "A 'special law' is a law applicable to a particular subject"—section 41 of the Indian Penal Code.

[7] "A 'local law' is a law applicable only to a particular part of British India"—section 42, *id.*

[8] Those curious to follow out the subject can complete a list of these Acts by referring to the author's "Chronological Table and Index to the Indian Statute Book"—Title "CIVIL LAW" in *Index*.

[9] Questions regarding succession, inheritance, marriage or caste, or any religious usage or institution, are to be decided according to Mahomedan law where the parties are Mahomedans, and according to Hindu law where the parties are Hindus, except in so far as such law has by legislative enactment been altered or abolished—see section 37 of The Bengal North-Western Provinces and Assam Civil Courts Act (XII of 1887) for the Provinces under the Lieutenant-Governors of Bengal and of the North-Western Provinces, and the Chief Commissioner of Assam (also *Shamshul Nissa* v. *Zohra Bibi*, 6 N. W. P. Rep. 2, and *Zuhurudin Sirdar* v. *Baharulla Sirkar*, W. R. 1864, 185): section 5, Act IV of 1872, as amended by s. 1, Act XII of 1878, for the Panjab: section 16, Act III of 1873 for the Madras Presidency: section 26, Regulation IV of 1827, which substitutes in the Bombay Presidency "the usage of the country in which the suit arose—if none such appears, the law of the defendant." section 3, Act XVIII of 1876 for Oudh: section 5, Act XX of 1875 for the Central Provinces section 4 of Regulation III of 1877 for Ajmere and Merwara: section 89 of the Baluchistan Agency Civil Justice Law, 1890, for British Baluchistan and section 4, Act XI of 1889 for Burmah. For the High Courts in the

cases not thus provided for, in the broad rule of *justice, equity, and good conscience*[1] prescribed for the Civil Courts in India as the rule of decision from the time that such Courts were first established under British rule. To these must be added, in so far as relates to the Presidency towns, the Common and Statute Law which prevailed in England in the year 1726,[2] and which has not since been altered by Statutes extending to India or by the Acts of the Legislative Council of India—the Statute Law expressly or by necessary implication[3] extending to India.

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exercise of their *Ordinary Original Civil Jurisdiction*, see 21 Geo. III, cap. 70, s. 17 (explained in *Sarkies* v. *Prosanno Mayi Dasi*, I. L. R. 6 Calc. 794: 8 C. L. R. 76: and *Jagat Mohini Dasi* v. *Dwarkanath Baischk*, I. L. R. 8 Calc. 582): clause 19 of the Charter of 1865 of the Bengal High Court (which must be read with clause 18 of the Charter of 1862, and with the letter from the Judges of the old Supreme Court, dated 16th October 1830, which will be found at p. 22, Vol. I of Morley's Digest): and the corresponding clauses of the Bombay and Madras Charters. For the same Courts in the exercise of their *Extraordinary Original Civil Jurisdiction*, see clause 20 of the Bengal Charter of 1865, (and *Grose* v. *Amritamayi Dasi*, 4 B. L. R. O. C. 1: 12 W. R. O. C. 13,) and the corresponding clauses of the Bombay and Madras Charters, and clause 13 of the North Western Provinces Charter. The High Courts in the exercise of their Civil Appellate Jurisdiction are to apply such law or equity and rule of good conscience as the Court in which the proceedings in the case were originally instituted ought to have applied—see clause 21 of the Bengal Charter of 1865, and the corresponding clauses of the Bombay and Madras Charters, and clause 14 of the North-Western Provinces Charter.

[1] See section 37, Act XII of 1887 for the Provinces under the Lieutenant-Governors of Bengal and of the North-Western Provinces, and the Chief Commissioner of Assam: section 6, Act IV of 1872 for the Panjab: section 16, Act III of 1873 for the Madras Presidency: section 26, Regulation IV of 1827 for the Bombay Presidency (*Mithibai* v. *Limji Nowroji Banaji*, I. L. R. 5 Bom. 506): section 4, Act XVIII of 1876 for Oudh: section 4, Act XI of 1889 for Burmah: section 6, Act XX of 1875 for the Central Provinces: section 5, Regulation III of 1877 for Ajmere and Merwara: section 89 of the Baluchistan Agency Civil Justice Law, 1890, for British Baluchistan: and the previous Note for the High Courts in the exercise of their Civil Jurisdiction, Original and Appellate.

[2] See *Advocate-General of Bengal* v. *Sarnamayi Dasi*, 9 Moo. I. A. 391: 1 W. R. P. C. 14: and *Lopez* v. *Lopez*, I. L. R. 12 Calc. 721.

[3] See 5 Bom. H. C. Rep. 91.

enacted since 1726, and not subsequently repealed—and the Civil Law as it obtained in the Ecclesiastical and Admiralty Courts in England.

Distinction between rules of evidence and other portions of Adjective Law not accurately observed.

§ 4. Rules of *procedure*, rules of *pleading* and rules of *evidence* all fall under the head of Adjective Law; but no very accurate line of distinction has been observed as to what forms the appropriate province of each set of rules respectively. Most English treatises on the *law of evidence* deal with many topics which, according to a different classification, belong to the head of *procedure*. To give an example, the Code of Civil Procedure enacts (section 13) that—"No Court shall try any suit or issue, in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"; and the Code of Criminal Procedure enacts (section 403) that a person, who has once been tried by a Court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence, while such conviction or acquittal remains in force. The matter of these provisions has been treated by most text-writers as belonging to the subject of 'evidence'; but other authorities think it to be concerned not with 'evidence' but with 'procedure'; and such is the view that has been taken by the authors of the Indian Codes.[4] Sir James Stephen, adopting a different classification, says—"All law may be subdivided into Substantive Law, by which rights, duties, and liabilities are defined; and the Law of Procedure, by which the Substantive Law is applied to particular cases. The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases,

[4] Mr. (now Sir James) Stephen's Speech—*Proceedings of the Legislative Council, March 30, 1872.*

decides: I—What facts may, and what may not, be proved in such cases; II—What sort of evidence must be given of a fact which may be proven; III—By whom and in what manner the evidence must be produced by which any fact is to be proved."[5] According to this phraseology the Law of Procedure is what Bentham terms Adjective Law, and it includes (1) the Law of Pleading, which ascertains the questions in dispute between the parties; (2) the Law of Evidence, which determines what facts may be proved, and how and by whom they are to be proved; and (3) rules for the conduct of the proceedings and for bringing before the Court the persons, documents and things by which these facts are to be proved.

Misapprehensions as to the true use of rules of evidence.

§ 5. The real use and importance of rules of evidence have not always been clearly understood; and the value of such rules has been in consequence underrated by persons who, owing to this misunderstanding, have expected these rules to accomplish impossible results, and have, as a matter of course, been disappointed. The exaggerated pretensions of the authors of certain systems, who have aspired at the complete discovery of truth (and, as might have been expected, have failed), have also done much to create dislike and distrust of any rules whatever on the subject. Archbishop Whately has shown that most of the complaints made against Logic are due to similar causes; and it may be observed that each system in its turn has been expected to accomplish what properly falls within the province of the other. It has been objected against *Logic*, for example, that it leaves untouched the greatest difficulties; and those which are the sources of the chief errors in reasoning, *viz.*, the ambiguity or indistinctness of terms, and the doubts respecting the degrees of evidence in various propositions—an objection which is not to be removed by any such attempt as that of Watts to lay down "rules for forming clear ideas," and "for guiding the judgment," but by replying that no art is to be

[5] Page ix of the Introduction to his *Digest of the Law of Evidence*, 1876.

censured for not teaching more than falls within its province, and, indeed, more than can be taught by any conceivable art. Such a system of universal knowledge as should instruct us in the full meaning of every term, and the truth or falsity, certainty or uncertainty of every proposition, thus superseding all other studies, it is most unphilosophical to expect or even to imagine. And to find fault with Logic for not performing this is, as if one should object to the science of Optics for not giving sight to the blind; or as if one should complain of a reading-glass for being of no service to a person who had never learned to read. In fact, the difficulties and errors above alluded to are not in the process of reasoning itself (which alone is the appropriate province of Logic), but in the subject-matter about which it is employed.[6]

Where rules of evidence will not assist.

§ 3. Similarly, there are two problems, and those by far the most important of any which a Judge has to solve, upon which rules of evidence throw no light at all, and on which they are not intended to throw any light. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the essential question—whether and how far he ought to believe what the witnesses say? Again, rules of evidence throw no light on a further question of equal importance which belongs to the domain, not of Evidence, but of Logic—what inference ought the Judge to draw from the facts which he believes to have been proved? In every judicial proceeding whatever, these two essential questions—Is this true? and, if it is true, what then?—ought to be constantly present to the mind of the Judge; but the rules of evidence do not throw the smallest portion of light upon either of them; and persons who are absolutely ignorant of those rules may occasionally give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. A more or less distinct perception of this, coupled with impatience of the exaggerated pretensions

[6] *Whately's Logic*—Introduction, § 5.

which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded, and which are merely a particular application of the vulgar error which in so many instances leads people to depreciate Art in comparison with Nature; as if there were any opposition between the two, and as if true Art did not pre-suppose and depend upon Nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see, if he be wholly lame or blind; so the best rules of evidence will not supply the place of natural sagacity or logical faculty; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as aids to the feet and to the eyes.[7]

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[7] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April 18, 1871.* In the *Principles of Judicial Evidence* which he subsequently published as an Introduction to the Evidence Act, he further says:—"The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required; but it is only in exceptional cases that questions arise which present any legal difficulty, or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a Judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a Judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another. The rules of evidence may provide tests, the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections; but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical experience of the Judge, not upon his acquaintance with the Law of Evidence."

Objection against such rules considered.

§ 7. The objection against rules of evidence, namely, that they are useless, inasmuch as it is possible without any such rules to try cases and adjudicate correctly, seeing that men in the ordinary concerns of life, without any such rules to guide them, act with safety upon the statements of others and discover with sufficient certainty those facts which ought to influence their conduct, may be compared to the popular objection made against Logic, that men may reason very well who know nothing of it. Now, in every instance in which we *reason*, a certain process takes place in the mind which is one and the same in all cases. Many persons are not even conscious of this process in their own minds much less competent to explain the principles on which it proceeds.[8] This indeed is, and cannot but be, the case with every other process respecting which any system has been formed; the practice not only *may* exist independently of the theory, but must have preceded the theory. There must have been language before a system of grammar could be devised; and musical compositions previous to the science of music. This shows the futility of the objections above referred to. The parallel instances adduced show that similar objections might be applied in many other cases, where their absurdity would be obvious; and there is no ground for deciding thence that system has no tendency to improve practice.[9] A rightly-formed system does not cramp the natural powers, but assists them.

Real use of rules of evidence.

§ 8. In addition to what has been just said, the real use and importance of rules of evidence will be further shown by the following considerations.[1] Those systems, which, like the

[8] Just as, of the many millions on the face of the globe capable of *walking*, a small number of persons only can explain the exquisite machinery of the human frame which enables the biped, by the exercise of the will, to progress, to recede, to go sideways at any angle, and to turn round.

[9] See *Whately's Logic*, Book I, § I

[1] "A youthful Achilles," says Archbishop Whately, "may acquire skill in hurling the javelin under the instruction of a Chiron, though the

French, dispense with all rules of evidence, obtain no other result from the want of them than floods of irrelevant gossip and collateral questions sufficient to confuse the strongest head and distract the most attentive mind. This will be readily intelligible to any one who has been present at the proceedings of an ordinary Court of Criminal Justice, where English rules of evidence are followed, and at the proceedings of a Court-Martial.[2] An ordinary Criminal Court never gets very far from the point, but a Court-Martial continually wanders into questions far remote from those which it is assembled to try.[3] A necessary consequence of the introduction of collateral and irrelevant questions is to prolong and extend the proceedings to an inconvenient and useless extent. On the other hand, the practical effect of rules of evidence, as shown by their operation in English Courts of Justice, is to exclude collateral and irrelevant matters, and so to shorten the proceedings,

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master may not be able to compete with the pupil in vigour of arm. * * * It has been truly observed that 'genius begins where rules end.' But to infer from this, as some seem disposed to do, that in any department wherein genius can be displayed, rules must be useless, or useless to those who possess genius, is a very rash conclusion. What I have observed elsewhere concerning Logic, that 'a knowledge of it serves to save a *waste* of ingenuity,' holds good in many other departments also. In travelling through a country partially settled and explored, it is wise to make use of charts, and of high-roads with direction-posts, as far as these will serve our purpose, and to reserve the guidance of the compass or the stars for places where we have no other helps. In like manner we should avail ourselves of rules as far as we *can* receive assistance from them, knowing that there will always be sufficient scope for genius in points for which no rules can be given"—*Whately's Rhetoric*, p vi of Preface. These remarks apply with equal if not greater force to rules of evidence.

[2] The case of the Monk Léotade, the affair of St. Cyr, and the case of Francois Lesnier given at the end of Mr. Stephen's "General View of the Criminal Law on England," afford at once instances and proof of this.

[3] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871. See also some excellent remarks on Courts-Martial in Warren's Law Studies, Vol. II, p 1023. The Indian Evidence Act applies to Native Courts-Martial, see section 1.

while attention is concentrated upon those points which are of essential importance. Having regard to the average of judicial ability, all Judges could not be expected to know how to set the same reasonable limits to the enquiries in which they may be engaged, yet without proper limits an incalculable waste of time and energy and a great weakening of the authority of the Court are sure to follow.[4] These evils are wholly prevented or to a great extent obviated by proper rules of evidence. Such rules are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty.[5] This consideration is especially valuable when applied to India, where many judicial officers have had no previous professional training, and where in too many Mufassil Courts no assistance is obtained from a trained Bar.

Their value as tests of truth.

§ 9. Rules of evidence are further of peculiar value to the Judge as furnishing him with solid tests of truth;[6] and this they do, not (as certain continental systems aspire to do) by constituting a scientific machinery by which truth as to facts and as to men's actions can be ascertained somewhat as physical truths can be ascertained by the processes in use among men of science,[7] but by supplying negative tests, warranted by long and varied experience, as to two great points,[8] namely—the relevancy

[4] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871.

[5] *Idem.*

[6] *Idem.*

[7] Mr. Maine's Speech—*Proceedings of the Legislative Council, December* 12, 1868.

[8] Elsewhere in his Speech Mr. Stephen says:—"A Law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law to the problem of inquiring into the truth as to controverted questions of fact." Those who would dispense with all rules of evidence would do well to remember that the experience of an individual is but a small drop in the sea of the added experiences of all the individuals who have followed any profession or pursuit from the beginning. As to whether rules of evidence could be abolished even by express enactment of the Legislature, Mr. Stephen

of facts to the question to be decided by the Court; and the sort of evidence by which particular facts ought to be proved. They may, in the broadest and most popular form, be stated thus:—If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—*First*, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes; *Secondly*, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had,—that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes; if it is a thing said, have before you some one who heard it said with his own ears; if it is a written paper, have the paper before you and read it for yourself.[9]

Proof of the utility of such rules drawn from India.

§ 10. The history of the administration of justice in India furnishes conclusive proof of the utility of rules of evidence and the necessity for some such rules in order to the success of a judicial system, however well constituted otherwise. Unfettered

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forcibly remarked as follows:—"There is a sense in which it may be said with perfect truth that even Legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the Legislature to provide that no rules of evidence shall have the force of law; but, unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss), the Judges infallibly will hear, and will be guided by, arguments upon the subject; and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic and inconvenient of all conceivable shapes."

[9] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1881.

by any rules or restraints, the Courts away from the Presidency towns became each a law unto itself. The reports of cases, decided in appeal by the old Sadr Courts and by the High Courts for some years after they were established, furnish ample proof of the evils and of the occasional injustice which resulted from this state of things, and the Lords of the Judicial Committee of the Privy Council in several instances made complaints and observations upon the nature of the evidence sent home from India.[1]

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[1] See the case of *Banwari Lal* v. *Hetnarain Singh* (7 Moo. I. A., 148: 4 W. R. P. C., 148), before the Privy Council, on the 22nd February, 1858, in which Dr. Lushington remarked:—"It is unfortunately too much the habit of these Courts to receive documents without that just discrimination which would prevail, *were the rules of evidence known and established*; but their Lordships are of opinion that they cannot in these cases take upon themselves to determine what ought or ought not to have been received in the Courts in India. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, *because the administration of justice was not more strictly conducted with reference to the admission of evidence*." In another case the following observations were made:—"Objections have been taken to the admissibility of this document as evidence, and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals. We must look to their practice—we must look to the essential justice of the case—and not hastily reject any evidence because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and more especially, where we find that it has been the practice of the Courts to receive documentary evidence without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this

History of the law of evidence in India.

§ 11. A brief history of the law of evidence in India previous to the passing of The Evidence Act will form an appropriate Introduction to the Act itself. Within the Presidency towns, in the Courts established by Royal Charter, the English rules of evidence have always been followed. Such of these rules as were contained in the Common and Statute Law which prevailed in England before 1726 were introduced by the Charter of that year.[2] Some others were rules to be found in subsequent Statutes expressly extended to India; while others, again, had no greater authority than that of use and custom—"*cursus curiæ est lex curiæ.*" Many of these rules consisted of those restrictions on the admissibility of evidence which Mr. Bentham attacked with such force at the commencement of the present century, and which have since been swept away under the enlightened auspices of Lord Denman, Lord Brougham, and others. India was not behindhand in the introduction of the

Courts established by Royal Charter.

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case, but almost in every other. Looking through the whole of these papers, we see that, both on the side of appellant and respondents, copies of documents coming out of a public office have been received upon the certificatet hat they were true copies, signed by the officer in charge of that department, and that, whether produced by the plaintiff or the defendant in the cause. We entertain no doubt, therefore, that this document must be received in evidence, but what weight is to be ascribed to it still remains to be considered."—*Unidi Rajaha Raje Venkataperumal Rauze* v. *Pemmasami Venkatadry Naidu*, 7 Moo I. A 128 4 W. R. P C. 121. The rule here allowed was followed later in the case of *Ajodhya Persad Singh* v. *Amrao Singh* (6 B. L. R. 509 15 W. R P. C. 1: 13 Moo. I A. 519), where the testimony of a trustworthy witness, that a person was to his knowledge *reputed* insane, was held to be an important corroboration of the direct testimony given to the fact of that person's insanity at the time, though perhaps such evidence might not have been receivable at a trial in a Court of Justice in England. Now that a Code of Evidence has been enacted for India, it is improbable that the highest tribunal will sanction any laxity which involves a violation of the rules of that Code.

[2] See *ante*, page 5.

reforms thus carried out in England. Act XIX of 1837 abolished incompetency by reason of a conviction for a criminal offence, and section 1 of Act IX of 1840 extended to Her Majesty's Courts of Justice in India the provisions of the 3rd and 4th Will. IV, cap. 92, as to interested witnesses. In 1843 Lord Denman's Act (6 and 7 Vict., cap. 85) was passed, which enacted that no person offered as a witness should be excluded, by reason of *incapacity from crime* or interest, from giving evidence either in person or by deposition; and in the following year Act VII of 1844 introduced similar provisions applicable to Her Majesty's Courts in the Presidency towns. In 1846 the Statute 9 and 10 Vict., cap. 95, first declared *parties to the proceeding, their wives and all other persons* competent as witnesses in the County Courts; and in 1851 Lord Brougham's Act (14 and 15 Vict., cap. 99) was passed, which declared the parties and the persons in whose behalf any suit, action, or proceeding might be brought or defended, competent and compellable to give evidence in any Court of Justice or before any person having by law or by consent of parties authority to hear, receive and examine evidence. Similar provisions were enacted for Her Majesty's Courts in India by Act XV of 1852. The Evidence Amendment Act of 1853 (16 and 17 Vict., cap. 83, introduced by Lord Brougham) made the husbands and wives of parties to the record competent and compellable as witnesses; and the same reform was introduced into India by Act II of 1855.

Courts not established by Royal Charter.

§ 12. For the Courts outside the Presidency towns and not established by Royal Charter, no complete rules of evidence were ever laid down or introduced by authority. There were, indeed, a few occasional directions, partly as to procedure, partly as to evidence, to be met with in the old Regulations; and some few rules embodying the most striking reforms, then recently introduced in England, were inserted in Act XIX of 1853, the operation of which was, however, restricted to the Bengal Presidency. Two years afterwards, Act II of 1855 was passed. This Act reproduced with some additions all the reforms advocated

by Mr. Bentham, and carried out in England by Lords Denman and Brougham; but nearly all its provisions presupposed the existence of that body of law upon which these reforms and amendments were ingrafted; and yet it was authoritatively laid down that the English Law of Evidence was not the law in the Mufassil.[3] It was also further decided that the rules of evidence

[3] By a Full Bench of the Calcutta High Court, in the case of *Queen v. Khairulla* (6 W. R. Cr. 21 · B L. R Sup. Vol App. 11) in which Peacock, C. J.. said :—"It is clear that the English Criminal Law was not the Criminal Law of the Mufassil, and that *the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.* . . The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. . . A Code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration. By the abolition of the Mahomedan law, *the law of England was not established in its place.* . . . . . In the case of European British subjects, who are governed by the law of England, we must administer that law. But *in the Mufassil, where the law of England is not the law of the country, &c.*"

The state of the case was thus summarized by the Commissioners, appointed to prepare a body of substantive law for India, in their Report presented to Her Majesty —"India does not at present possess an uniform law upon this subject. *Within the Presidency towns the English Law of Evidence is in force*, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important: This Act contains many valuable provisions. It extends the range of judicial notice, and facilitate the proof of documents, of foreign systems of law, and of matters of public history It removes *incompetency* to testify by reason of interest or relationship; renders *parties to suits* liable to be called as witnesses, and makes *husband and wife* competent witnesses for or against each other in civil proceedings; renders dying declarations admissible, though the declarant may have entertained hopes of recovery; provides that witnesses may be cross-examined by the party who called them and that they shall not be excused from answering questions because they may thereby criminate themselves. Declarations which were against the *pecuniary interest* of the persons who made them, and entries according to the usual course of business, both of which kinds of evidence the English law admits only in case of death, are under this Act admissible, if the person who made the declaration or the entry has become incapable

to be found in Hindu and Mahomedan law were not binding on Mufassil Courts.[1]

§ 13. The real state of the case would then seem to have been this. All persons admitted that the Mahomedan law of evidence was not to be followed. The *whole* of the English Law of Evidence had never by any general enactment been rendered applicable to India, though some portions of it, in a modified shape or otherwise, had been expressly incorporated in the Statute Law of this country; Act II of 1855 being the largest entire specimen of this fragmentary legislation, while other fragments were to be found scattered through the Statute Book, more especially in the Codes of Civil and Criminal Procedure. Where the Statute Law was silent, it devolved upon the higher Courts to supply the deficiency with case-made law, from which, as is well known, nearly the whole of the English unwritten code has been constructed.

Real state of the case.

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of giving evidence, or if his testimony cannot be procured. The Act also gives to *books regularly kept* and to certain commercial documents the character of corroborative, though not of independent, evidence, and makes entries in such books independent evidence of certain formal matters; it extends the class of persons whose declarations are admissible in cases of pedigree, and provides in effect that mistakes committed in the rejection or reception of evidence shall not lead to a new trial or to the reversal of a decision unless a substantial failure of justice has been caused thereby. *The Act, however, bears reference in many places to the existing law, and it appears to have been designed, not as a complete body of rules, but as supplementary to and corrective of the English law, and also of the customary law of evidence prevailing in those parts of British India where the English law is not administered.* This customary law has not assumed any definite form; the Mahomedan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the Country Courts, even in criminal matters; and those Courts have, in fact, no fixed rules of evidence except those contained in Act II of 1855. *They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.*"

[1] See extract from the Full Bench decision in the last Note; and Arbuthnot's Select Reports (Madras), Preface, p. 27.

In laying down precedents and settling disputed points, these higher Courts carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country, and their modifying effect on principles of general application; and where, with due regard to these considerations, they found themselves able to follow the English Law of Evidence, they were generally willing to take it as their guide. The whole of the Indian Law of Evidence might then have been divided into *three* portions, *viz.*: one portion *settled* by the express enactments of the Legislature; a second portion *settled* by judicial decisions; and a third or *unsettled* portion,—and this by far the largest of the three, which remained to be incorporated with either of preceding portions.

Unsatisfactory state of the law.

§ 14. On introducing the Draft Bill[5] drawn up by Her Majesty's Commissioners, Mr. Maine,[6] who was then the Legal Member of Council, after quoting the observations made by the Commissioners in their Report, proceeded to remark as follows:—"During the last ten or fifteen years the doctrine that the English Law of Evidence was *vi proprid* in force throughout the whole of the country has certainly gained strength, and the habit of applying that law with increasing strictness is gaining ground.

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[5] This Bill never got beyond the first reading. It was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of the country. The chief objection to it was that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected from them. Mr. Stephen spoke thus of it in Council:—"I may observe in general, however, that the principal reasons were that the Bill was not sufficiently elementary, that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English handbooks with the English law upon this subject. The Commissioners' Draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English law."

[6] Now Sir Henry Sumner Maine.

No doubt, much evidence is received by the Mufassil Courts which the English Courts would not regard as strictly admissible. But I would appeal to Members of Council who have had more experience in the Mufassil than myself, whether the Judges of those Courts do not, as a matter of fact, believe that it is their duty to administer the English Law of Evidence as modified by the Evidence Acts. In particular, I am informed that when a case is argued by a barrister before a Mufassil Judge, and when the English rules of evidence are pressed on his attention, he does practically accept those rules, and admit or reject evidence according to his construction of them. I cannot help regarding this state of things as eminently unsatisfactory. I entirely agree with the Commissioners that there are parts of the English Law of Evidence which are not suited to this country. We have heard much of the laxity with which evidence is admitted in the Mufassil Courts, but the truth is, that this laxity is to a considerable extent justifiable The evil, it appears to me, lies less in admitting evidence, which under strict rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of the Law of Evidence is an evil, but it would be an equal, or perhaps even a greater, evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision. I would venture to state my impression that the fault of substance ordinarily committed by the Mufassil Courts consists less in lax admission of evidence than in averting their attention from the evidence really before them, and in conjecturing the facts of the case upon probabilities derived from a consideration of what the Natives of this country would be likely to do under given circumstances.[7] Another objection lies in the necessity which the Mufassil Judges are thus placed under of depending upon English text-books. There are excellent text-books of the English Law of Evidence, but their usefulness consists more in refreshing

[7] The author can add the testimony of his experience to the truth of the above remarks.

knowledge which has been gained by forensic experience than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India is a liberalized version of the English Law of Evidence, enacted with authority, and thus excluding caprice, and superseding the use of text-books by compactness and precision."[8]

English Law practically followed.

§ 15. More than two years after, Mr. Stephen (Mr. Maine's successor), when introducing the Bill which has since become law, with not less truth, expressed himself thus:—"It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English Law of Evidence has not been introduced into this country, English lawyers and quasi-lawyers have; and they have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered; a good deal may be said for unaided mother-wit and natural shrewdness; but a half-and-half system, in which a vast body of half-understood law, totally destitute of arrangement, and of uncertain authority, maintains a dead-alive existence, is a state of things which it is by no means easy to praise."[9]

§ 16. It will readily be conceived that the necessity for legislation was admitted, when the unsatisfactory state of things above described came to be fully realized. It being then resolved to prepare a Code of Evidence for India, the question arose—"What

[8] *Proceedings of the Legislative Council*, 12*th December*, 1868.
[9] *Proceedings of the Legislative Council*, 18*th April*, 1871.

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system was to be taken as the model for this Code?" Her Majesty's Commissioners, when presenting the Bill drawn up by them, made in their report the following remarks on this point:—"In laying down uniform rules for the guidance of the Indian Judges in general, as well in the Courts just mentioned as in those in which the English Law of Evidence has hitherto prevailed, we do not think that it would be advisable to adopt a system so artificial as that which has grown up in this country. The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India. In England the aim has been to avoid presenting to the consideration of the jury whatever it was thought could not safely be presented to an unprofessional tribunal. In order to obtain this end, various kinds of evidence, which were deemed little worthy of credit were pronounced inadmissible, and a great deal of evidence, which, if duly weighed and dispassionately considered, would tend to the elucidation of truth, is absolutely excluded. . . . . In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is a greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it. It seems, therefore, better to afford every facility for the admission of truth, although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted."

English Law of Evidence in its entirety not suited to India.

§ 17. Believing that the English Law of Evidence contained the most excellent rules derived from the most extensive experience, the Commissioners, while omitting all that appeared to them unsuited to India, endeavoured to adapt the rest to the peculiar requirements of the administration of justice as above described. The Draft Bill

The First Bill.

prepared by Her Majesty's Commissioners did not, however, meet with approval in India. The Select Committee of the Legislative Council, to whom it was referred for report, after a very careful consideration of the Draft, arrived at the conclusion that it was not suited to the wants of the country. The grounds on which this conclusion was based were, in a few words, "that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected from them."

The Second Bill.

§ 18. The Select Committee accordingly proceeded, under the auspices and guidance of Mr. (afterwards Sir James) Stephen, to prepare a new Bill, as to which they speak thus in their report :—"In general, it has been our object to reproduce the English "Law of Evidence with certain modifi-"cations, most of which have been sug-"gested by the Commissioners, though "with some this is not the case. The English Law of Evidence "appears to us to be totally destitute of arrangement. This "arises partly from the circumstance that its leading terms are "continually used in different senses, and partly from the cir-"cumstance that the Law of Evidence was formed by degrees "out of various elements, and in particular out of the English "system of pleading and the habitual practice of the Courts of "Common Law.[x] For instance, the rule that evidence must be "confined to points in issue is founded on the system of pleading. "The rule that hearsay is no evidence is part of the practice of "the Courts; but the two sets of rules run into each other in "such an irregular way as to produce between them a result "which no one can possibly understand systematically, unless he "is both acquainted with the principles of a system of pleading

Evidence Act based on English Law of Evidence modified to suit India.

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[x] Sir Henry Sumner Maine said, that the English Law of Evidence would probably never have come into existence but for one peculiarity of the English judicial administration—the separation of the Judge of law from the Judge of fact, of the Judge from the Jury.—*Proceedings of the Legislative Council, 12th December*, 1868.

"which is being rapidly abolished, and with the every-day practice "of the Common Law Courts, which can be acquired and under-"stood only by those who habitually take part in it. This know-"ledge, moreover, must be qualified by a study of text-books, "which are seldom systematically arranged. Many other circum-"stances, to which we need not refer, have contributed largely to "the general result; but we may illustrate the extreme intricacy "of the law, and the total absence of anything like system which "pervades every part of it, by a single instance. In Mr. Pitt "Taylor's Work on Evidence, it is stated that 'ancient documents, "when tendered in support of ancient possession, form the third "exception to the rule which excludes hearsay. The question "is, whether A is entitled to a fishery. He produces a Royal "Grant of the fishery to his ancestor. This fact the law de-"scribes as a peculiar kind of hearsay admissible by special ex-"ception. Surely this is using language in a most uninstructive "manner. This being the case, we have discarded altogether the "phraseology in which the English text-writers usually express "themselves, and have attempted first to ascertain, and then to "arrange in their natural order, the principles which underlie the "numerous cases and fragmentary rules which they have collect-"ed together. The result is as follows :—

On what principles constructed.

§ 19. "Every judicial proceeding whatever has for its purpose "the ascertaining of some right or liabi-"lity. If the proceeding is criminal, the "object is to ascertain the liability to punishment of the person "accused; if the proceeding is civil, the object is to ascertain some "right of property or of status, or the right of one party, and the "liability of the other, to some form of relief. All rights and "liabilities are dependent upon and arise out of facts, and facts "fall into two classes, those which can, and those which cannot, "be perceived by the senses.[2] Of facts which can be perceived "by the senses, it is superfluous to give examples. Of facts "which cannot be perceived by the senses, intention, fraud, good

[2] See Chapter II of the Introduction to Sir James Stephen's Indian Evidence Act.

"faith, and knowledge may be given as examples. But each class "of facts has, in common, one element which entitles them to the "name of facts—they can be directly perceived either with or "without the intervention of the senses. A man can testify to "the fact that, at a certain time, he had a certain intention, on "the same ground as that on which he can testify that, at a "certain time and place, he saw a particular man. He has, in "each case, a present recollection of a past direct perception. "Moreover, it is equally necessary to ascertain facts of each "class in judicial proceedings, and they must in most cases be "ascertained in precisely the same way.

Relation of facts to rights and liabilities.

§ 20. "Facts may be related to rights and liabilities in one "of two different ways—(1) They may by "themselves, or in connection with other "facts, constitute such a state of things that the existence of the "disputed right or liability would be a legal inference from them. "From the fact that A is the eldest son of B, there arises of "necessity the inference that A is by the law of England the heir-"at-law of B, and that he has such rights as that status involves. "From the fact that A caused the death of B under certain "circumstances, and with a certain intention or knowledge, there "arises of necessity the inference that A murdered B, and is "liable to the punishment proved by law for murder. Facts thus "related to a proceeding may be called facts in issue, unless, "indeed, their existence is undisputed. (2) Facts which are not "themselves in issue in the sense above explained may affect "the probability of the existence of facts in issue, and these "may be called *collateral facts*. It appears to us that these two "classes comprise all the facts with which it can in any event be "necessary for Courts of Justice to concern themselves, so that "this classification exhausts all facts considered in their relation "to the proceeding in which they are to be proved.

Question of proof considered.

§ 21. "This introduces the question of proof. It is obvious "that, whether an alleged fact is a fact in "issue or a collateral fact, the Court can "draw no inference from its existence till it believes it to exist,

"and it is also obvious that the belief of the Court in the "existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object "and nature of the proceeding in which its existence is to be "determined. The question is, whether A wrote a letter. The "letter may have contained the terms of a contract; it may have "been a libel; it may have constituted the motive for the commission of a crime by B; it may supply proof of an *alibi* in "favour of A; it may be an admission or a confession of crime; "but, whatever may be the relation of the fact to the proceeding, "the Court cannot act upon it unless it believes that A did write "the letter, and that belief must obviously be produced in each "of the cases mentioned by the same or similar means. If, for "instance, the Court requires the production of the original when "the writing of the letter is a crime, there can be no reason why "it should be satisfied with a copy when the writing of the letter "is a motive for a crime. In short, the way in which a fact "should be proved depends on the nature of the fact, and not on "the relation of the fact to the proceeding.

Evidence—What?

§ 22. "The instrument by which the Court is convinced of a "fact is evidence. It is often classified "as being either direct or circumstantial. "We have not adopted this classification. If the distinction is "that direct evidence establishes a fact in issue, whereas circumstantial evidence establishes a collateral fact, evidence is "classified not with reference to its essential qualities, but with "reference to the use to which it is put; as if paper were to be "defined, not by reference to its component elements, but as "being used for writing or for printing. We have shown that the "mode in which a fact must be proved depends on its nature, and "not on the use to be made of it. Evidence, therefore, should "be defined, not with reference to the nature of the fact which it "is to prove, but with reference to its own nature.

Cause of ambiguity in the use of the word 'Evidence.'

§ 23. "Sometimes the distinction is stated thus—Direct evi- "dence is a statement of what a man has "actually seen or heard; Circumstantial

"evidence is something from which facts in issue are to be inferred. "If the phrase is thus used the word 'evidence in the two phrases "('direct *evidence*' and 'circumstantial *evidence*')opposed to each other "has two different meanings. In the first, it means testimony; in the "second, it means a fact which is to serve as the foundation for "an inference It would, indeed, be quite correct, if this view is "taken, to say 'Circumstantial evidence must be proved by direct "evidence.' This would be a most clumsy mode of expression, "but it shows the ambiguity of the word 'evidence,' which means "either[3]—(1) words spoken or things produced in order to con-"vince the Court of the existence of facts; or (2) facts of which "the Court is so convinced, which suggest some inference as to "other facts. We use the word 'evidence' in the first of these "senses only, and so it may be reduced to three heads: (1) Oral "Evidence; (2) Documentary Evidence, (3) Material Evidence. "Finally, the evidence by which facts are to be proved must be "brought to the notice of the Court and submitted to its judg-"ment, and the Court must form its judgment respecting them."

Skeleton of the Act.

24. The following skeleton of the contents of the Act, as passed, will show how the subject has been distributed under the heads above indicated:—

PART I.—RELEVANCY OF FACTS.

Chapter I.—Preliminary Definitions.

Chapter II.—Of the Relevancy of Facts.

PART II.—ON PROOF.

Chapter III.—Facts which need not be proved.

Chapter IV.—Of Oral Evidence.

Chapter V.—Of Documentary Evidence.

Chapter VI.—Of the exclusion of Oral by Documentary Evidence.

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[3] Mr Stephen said in his Speech of the 18th April, 1871:—"The main feature of the Bill consists in the distinction drawn by it *between the relevancy of facts and the mode of proving relevant facts.* The neglect of this distinction by English text-writers no doubt arises from the ambiguity of the word 'evidence,' and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically."

PART III.—PRODUCTION AND EFFECT OF EVIDENCE.

Chapter VII.—Of the Burden of Proof.
Chapter VIII.—Estoppel.
Chapter IX.—Of Witnesses
Chapter X.—Of the Examination of Witnesses.
Chapter XI.—Of improper Admission and Rejection of Evidence.

Distinction between functions of a Judge in India and in England.

25. We have seen that her Majesty's Commissioners recognized an important distinction between the functions of a Judge in England and the functions of a Judge in India. In the latter country a Judge is, in all civil cases, and in the majority of criminal cases, Judge both of fact and of law. The Select Committee did not lose sight of this very important distinction in preparing their Bill, as will appear from the following remarks of Mr. Stephen :—

"That part of the Law of Evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—*the Judge has to conduct the whole trial himself*. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a

distinct declaration that it is the duty of the Judge especially in criminal cases, not merely to listen to the evidence put before him, but to enquire to the utmost into the truth of the matter.[4] We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."

[4] The Bill was subsequently somewhat modified in this respect, but see section 165, *post*

[5] The following Note, taken from the first edition of this work, is still important in connection with the above remarks:—"The task of a Judge is much easier in an English, than in an Indian, Court of Law. In England the parties or their counsel fix the issues, and decide what evidence they will produce thereupon. In India the Judge selects the issues, because there are no counsel competent to do so This one duty, thrown of necessity on Indian Judges, renders *Mufassil experience a sine qua non* for the Mufassil Bench. The duty of the Judge in the settlement of issues was discussed by the Calcutta High Court in the case of *Jasoda Kunwar* v. *Gauri Baijnath Prasad* (1 Jurist, 365), in which it was held that the client is not bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge The following extract from this decision is important:—"But then it "is said that, the appellant's pleader having given his consent to these "issues, she is bound by his act, and may not contend that those issues "were erroneous This argument, however, in my opinion, assumes for "pleaders in the Mufassil Courts of this country an authority which they "do not possess, and with which it would not be safe to invest them, "and which, moreover, as we shall show, is not contemplated by the "law of procedure in India. In England, no doubt, the law is, that "parties are bound not merely by admissions but by the view taken "of their cases, and the mode of conducting them by their counsel at "the trial. The mode in which issues are to be framed is to be found "in sections 139 to 141 (i.e., of Act VIII of 1859), which clearly show "that this is exclusively the function of the Court. Section 139 declares "that the Court may frame the issues from the allegations of fact which "it collects from the oral examination of the parties or their pleaders, "notwithstanding any difference, &c. *This clearly shows that the pleader "may bind his client by a statement of matters of fact, but nothing*

Object of the remaining portion of this Introduction.

§ 26. Having given a sketch of the history of the Law of Evidence in India, and some description of the principles which have been followed in framing the Act, by which the Courts in India are now to be guided in dealing with evidence, I leave

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"*is said of issues or admissions of law.*" (See now sections 146—148 of "Act XIV of 1882.)

"The only cases in which the issues are not directly framed by the "Court are those provided for by sections 142 and 143. In those cases, "issues may be tendered to the Court under a solemn agreement between "*the parties* in writing, by which they bind themselves to act according "to the finding of the Court upon such issues, and the Court, if it be "satisfied that the *parties* have so agreed, and that the question is *fit to* "*be tried* (still retaining a control over the frame of the issue), may "proceed to determine the same. There was no agreement of the sort "here, and the responsibility of the issues lay wholly on the Court." (See now sections 150-151 of Act XIV of 1882.)

"In the Mufassil Courts, no doubt, particular acts done within the "conditions of the *vakálatnama* and admissions of fact by the pleader, "are binding on the client, but we cannot hold that the client is bound "by the mistaken consent of his pleader to abide by issues of law erro-"neously framed by the Judge, and not properly arising in the case."

A party is bound by an admission of a *fact* made by his vakil—see *Abdul Ghani* v. *Gaur Mani Debya*, 9 W. R. 375: *Narain Rai* v. *Srinath Mitra*, 9 W. R. 485: *Kalikanand Bhattacharjya* v. *Giribala Debya*, 10 W. R. 322: *Umabati* v. *Parushnath Pandey*, 15 W. R. 135: *Srimati Dasi* v. *Petambar Pandah*, 21 W. R. 332: *Berkeley* v. *Chittar Kuar*, 5 N. W. P. Rep. 2: *Rajendra Narain Rai* v. *Bijai Gobind Singh*, 2 Moo. I. A. 253. But this does not apply to criminal cases.—*Queen* v. *Kazim Mandal*, 17 W. R. Cr. 49. A plaintiff is not bound by an admission of a point of law nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled: *Jotendro Mohan Tagore* v. *Ganendro Mohan Tagore*, 18 W. R. 367. See also *Ram Kunt Chaudhri* v. *Brindaban Chandra Das*, 16 W. R. 246. A vakil employed to conduct a case has no implied authority to compromise it. There must be an express clause in his *vakálatnama* giving him authority to compromise, otherwise a compromise made by him will not be binding upon his client—*Prem Sukh* v. *Pirthi Ram*, 2 Agra Rep. 222: *Gaur Prasad Das* v. *Sukdeb Ram Deb*, 12 W. R. 279: *Sirdar Begum* v. *Izzat-ul-Nissa*, 2 N. W. P. Rep. 149. In the case of *Ram Kumar Rai* v. *The Collector of Birbhum* (5 W. R. 80) it was

the details of the measure to be gathered from the study of the Act itself, and I trust that those Notes, by which I have endeavoured to make its provisions readily intelligible to those who have had no previous knowledge of the subject, will facilitate

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held, that a *vakálatnama*, which was broad and general in its terms and empowered the pleader to act and take any steps in the case, was *primâ facie* a sufficient authority for an application by the pleader to withdraw from the suit (under s. 97, Act VIII of 1859) with leave to sue again on the same cause of action, and that the client was bound by the order passed on this application; no application having been made to the Lower Court to set aside the order complained of, and there being nothing to show that the pleader had acted contrary to his instructions, —there being also no allegation of fraud or misconduct on his part. Where a pleader, authorized to conduct the defence in the usual manner, pledged his client to relinquish his defence, if the plaintiff would assert on oath that the defendants were not the owners of the property in dispute, it was held that he had exceeded his powers, and that his clients were not bound by his acts—*Hakimanissa* v. *Baldeo*, 5 Agra Rep. 309. So also where, a case having been remanded by the High Court, a pleader gave up a part of the claim, having received no instructions to abandon such part—*Abdul Subhan Chaudhri* v. *Sib Krishta Deo*, 3 B. L. R. App. 15; and where in a suit for possession the defendant's pleader stated that if the *tak* map (not at the time in Court) could show that the lands in dispute had been surveyed as part and parcel of the plaintiff's taluk, his client would give up his claim: *Chandra Kumar Deo* v. *Sadakat Mahomed Khan*, 18 W. R. 436.

But if a pleader gives consent under clause 3 section 3 of the Dekhan Agriculturists' Relief Act (XVII of 1879) to the disposal of a suit according to the provisions of Chapter II of the Act, the consent so given cannot be withdrawn after the hearing has begun and the suit has proceeded on the footing of such consent—*Rupchand Khemchand* v. *Balvant Narayan*, I. L. R. 11 Bom. 591.

In *Ramsey* v. *King* (33 L. T. Rep. N. S. 728) a client was held bound by a compromise entered into and announced in his presence by counsel in open Court, although it was made contrary to his express prohibition, on the ground that a repudiation of counsel's authority must be made openly and without delay or not at all. It has been decided that an attorney in the Courts of Common Law has general authority to compromise an action, provided he acts *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of his client (*Prideaux* v. *Poley*, 18 C. B. N. S. 806: *Chown* v. *Parrot*, 14 C. B. N. S. 74: *Fray* v.

and assist this study. As this Work is intended more especially for beginners—for those who, without much previous training and without having practised as advocates, will be required to exercise judicial functions at an early age, when they must naturally be deficient in experience, one of the most valuable qualities in a Judge—as well experience in a general sense, as also experience of a new country, a new people, a new language, and social and domestic habits quite different from those of the West,—I shall devote the remaining portion of this INTRODUCTION to some observations intended to assist the judicial officer in dealing with evidence in India. I am well aware that no positive rules can be laid down for guidance in this direction. The best aids are natural sagacity and experience. No amount of study can create these qualities, but, where they exist, they may be materially quickened and assisted by hints drawn from the sagacity and experience of others, who have antecedently laboured in the same field.[6]

Fowles, 1 El and El. 839). In the Court of Chancery it was held otherwise (*Swinfen* v. *Swinfen*, 25 L. J C. P. 303), but the question can scarcely be said to be settled An attorney, authorized to appear for a party in an action, has authority to refer it to arbitration without any fresh authority to that effect (*Faviell* v. *Eastern Counties Railway Company*, 2 Exchq. 344). So, in this country it has been held that a counsel unless his authority is revoked, and such revocation is notified to the opposite side, has by virtue of his retainer and without need of further authority full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was so entered into under a mistake and that some palpable injustice has been thereby caused to the client—*Jang Bahadur Singh* v. *Shankar Rai*, I. L. R. 13 All. 272. The position of a barrister or solicitor thus differs widely from that of a pleader.

[6] "In *no* department can systems of art equalize men of different degrees of original ability and experience, or teach us to accomplish all that is aimed at. No system of agriculture can create land; nor can the Art Military teach us to produce, like Cadmus, armed soldiers out of the earth though land and soldiers are as essential to the practice of these arts, as the well-known preliminary admonition in the Cookery Book, 'first take your carp,' is to the culinary art. Nor can all the books that ever were written bring to a level with a man of military genius and

Tests of the credibility of witnesses.

§ 27. "I suppose," said Archbishop Whately, "it will not be denied that the three following are among the most important points to be ascertained in deciding on the credibility of witnesses: *first*, whether they have the means of gaining correct information; *secondly* whether they have any interest in concealing truth; and *thirdly*, whether they agree in their testimony."[7] The two first of these tests are applicable to the witnesses individually; the third to the whole of the testimony taken together, to which a further and scarcely less important test also applies, namely, "is the evidence consistent with the usual and known principles of human action and with the common experience of mankind?" The value of this latter test depends upon the connexion usually found to exist between certain things and upon the supposition that there is a general uniformity both in natural events and in human conduct.

Is the evidence consistent with itself?

§ 28. Another test is the consistency or inconsistency of the evidence with itself. "The usual character of human testimony," says Dr. Paley, "is *substantial truth under circumstantial variety*. This is what the daily experience of Courts of Justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the mind of the Judge. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud." If the reader has ever been present at some startling accident or other abnormal occurrence, and has afterwards talked over the incidents of the occasion with others who were also present, he will readily realize the truth of these remarks for himself. He has, no doubt, found that he observed some things which did not attract the attention of some

experience a person of ordinary ability who has never seen service."—*Whately's Rhetoric*. Introduction, § 4.

[7] *Historic Doubts relative to Napoleon Buonaparte*, p. 14, sixth edition.

of his fellow-observers, while some of them have seen matters which escaped his observation. The angle of view at which each observer stands, the objects that more or less intervene, the number of surrounding and distracting circumstances, and the difference between the powers of observation and keenness of sight of different individuals, together with other causes, will readily account for this *circumstantial variety*, while all are agreed about the broad incidents of the *substantial truth*. If such circumstantial variety is possible, where the attention has been roused and stimulated by an occurrence unusual and out of the ordinary routine of daily life, how much more must it be possible when there is nothing to rouse and stimulate the mind to more than ordinary attention! We find accordingly in the experience of every-day life that men, whom we know to be most truthful and honest, derive the most opposite impressions from the same sources of ideas. The reader can easily instruct himself by following out this train of thought, and can test these remarks by applying them to the ordinary incidents of his own life. Experience will thus convince him that a certain variety in detail accompanies and even indicates truth, while a close and minute agreement is significant of conspiracy and falsehood.

Agreement of undesigned coincidences.

§ 29. There is, however, one kind of agreement which has been justly considered a strong indication of truth, *viz.* the agreement of *undesigned coincidences*. "Where several witnesses," says Mr. Starkie, "bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions—either the testimony is true, or the coincidences are the result of concert and conspiracy." To determine which is actually the case, there are two valuable tests: *First*, are the witnesses independent, and acting without concert? *Second*, are the coincidences natural and undesigned? If it clearly appear that the witnesses are independent and acting without concert, and if the coincidences in their testimony be too

numerous to be the result of mere accident, there will be created a presumption in favour of truth, which will exist independently of the credit of the witnesses themselves for honesty and veracity. "It is manifest," says Archbishop Whately, "that the concurrent testimony, positive or negative, of several witnesses, when there can have been no concert, and especially when there is any rivalry or hostility between them, carries with it a weight independent of that which may belong to each of them considered separately. For though, in such a case, each of the witnesses should be even considered as wholly undeserving of credit, still the chances might be incalculable against their all agreeing in the *same* falsehood."[8] It deserves likewise to be attended to on this subject," says Dr. Campbell, "that in a number of concurrent testimonies (in cases wherein there could have been no previous concert), there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses—a probability which would remain even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no other cause but the reality of the fact."[9]

Concert between witnesses in India.

§ 30. In India,[1] even in the most true cases, there is generally more or less concert between the witnesses on the same side. Coming generally from the same village, and personally known to each other, they travel together on foot to the Court, which is often more than one day's journey from their homes. Certain to beguile the tediousness of the way with conversation on the object of their journey, each tells all he knows for the benefit of the others. Arrived at the town or village where the Court is situate, they commonly lodge together, and together sit under

[8] *Whately's Rhetoric*, Part I, Chap. II, § 4.

[9] *Campbell's Philosophy of Rhetoric*, Chap. V. Book 1, Part III, p. 125.

[1] These remarks apply more especially to the Bengal Presidency, in which the author's experience has lain.

the big trees[2] which surround the Court-house, waiting, it may be one day or several days, to have their testimony recorded, and still discoursing of what they have got to say and how to say it. Then the low *mukhtars*,[3] the unlicensed practitioners and case mongers who infest every Court in India, are sure to warn the parties at whose instance the witnesses are about to be examined of the danger of letting them go before the *hákim*[4] unprepared. As the natural result, the task of preparation is entrusted to these questionable advisers, and the witnesses are prepared by being drilled in the whole story, as gathered from the several accounts given by each—the *mukhtar* making such additions and improvements as to him seem advisable in order to render the whole evidence conformable to what in his opinion it should be, and impressing upon the witnesses the danger to the case if they should differ from each other in the smallest particular. It will not be surprising that, under the circumstances just described, the witnesses on the same side commonly know the *whole* story with every detail and incident thereof, and tell that story in the same language and with the same sequence of particulars;[5]

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[2] Most *Kachahries* or Court-houses in India are surrounded with trees for purposes of shade.

[3] *Mukhtar*, literally 'chosen,' 'selected,' 'invested with power,' is a native agent or attorney.

[4] 'Judge,' 'Magistrate.'

[5] In a case which came before the author when a Magistrate, *five* witnesses, describing an assault said to have been committed by *eleven* persons, each and all detailed the names of the eleven accused *in the same order*. It may safely be said that, without concert, this could not possibly happen. The *mukhtar* obtained a copy of the *complaint* made some days previously against the accused by name for the purpose of obtaining a summons; and, in order to guard effectually against discrepancy, he had made each of the five witnesses *commit it to memory*.

In the case of serious offences triable by Magistrates, and which the Police are authorized to investigate, the *duty* of preparation is occasionally performed by the Police, especially if they be of the old school. In the case of the more serious offences triable by the Court of Session, the witnesses have usually been examined by the Police and by the Magistrate before they appear at Sessions, where their testimony is therefore likely to be unusually perfect.

and that the *circumstantial variety*, which is so strong an indication of truth, is nowhere apparent. In England, fraudulent concert and untruthfulness might safely be assumed; but such an assumption would be far from being a safe one in the majority of instances in India.

Mode of testing concert between Indian witnesses.

§ 31. The Indian Judge or Magistrate, who is desirous of ascertaining whether such concert is or is not an indication of falsehood, should, instead of allowing the witnesses to tell their voluble tale in the language which has been put into their mouths, take them in hand himself or have them taken in hand by a competent pleader (if there is one engaged in the case), and by putting suitable questions elicit from them what they really know of their own knowledge.[6] When this course is adopted,

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[6] "The task of interrogation," says Mr. Norton, "requires much experience. The practice in the Company's Courts, I believe, is to allow the witness in the first instance to tell his own story and then for the Court and parties to found any questions they please upon his statement. *I prefer the plan of compelling a witness to answer questions in the first instance.* When the story is made up, it is evident that the witness has a much easier task in simply giving an uninterrupted narrative, than in delivering himself of it in such order as his interrogator may choose. Time too is saved if the witness be compelled to answer succinctly the questions put to him, and he be not allowed to ramble into immaterial or impertinent statements"—§ 812. The author has often found it convenient to let the *first* witness tell the story as prepared: and, when *second* and successive witnesses are evidently running off in the same groove, to take them in hand and interrogate.

In the case of *Ramgati* v. *Imitari Bandi* (1 B. L. R. S. N. xx), *Peacock*, C. J., said:—"It was remarked by the Lords of the Judicial Committee of the Privy Council, in a recent case (*Surendra Nath Rai* v. *Hiramani Barmani*, 1 B. L. R. P. C. 33)—'It is the great misfortune of Hindu 'litigants that their cases often fall in the earlier stages of litigation into the hands of incompetent advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a 'true case, from some mistaken views of policy or difficulty, create often 'impediments to its success, from which the true story, if revealed, 'would have been free;'—and I may add that it is another great misfortune of litigants in the Mufassil in this country, that the witnesses,

the witness is compelled to rely for his answers upon his own knowledge and memory instead of the story which he has learned by heart, and a little patience and care will soon enable the Judge or Magistrate to discover whether his testimony has been wholly invented or merely subjected to the process of preparation above described.

Are the coincidences natural and undesigned.

§ 32. Passing now to the second test for determining whether coincidences are the marks of truth or the result of concert and conspiracy, I cannot do better than quote Mr. Starkie, who writes thus:—"The nature of such coincidences is most important. Are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute or remote points,[7] which were not likely, to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration. Human cunning to a certain extent may fabricate coincidences even with regard to minute points, the more effectually to deceive, but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited. The witnesses of art will be copious in their detail of circumstances, as far as their provision extends: beyond this they will be sparing and reserved for fear of detection, and thus their testimony will not be even and consistent: but the witnesses of truth will be equally

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who are called to prove the facts of the case, are not properly examined through the incompetency of those who have the management of the suits, and that the Judges do not make up for that incompetency by *themselves examining the witnesses* or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure. If the Munsif failed in the performance of his duty in that respect, the Principal Sadr Amin had the power under the Code of Civil Procedure to require further evidence."

[7] *Undesigned* testimony is manifestly so far the stronger, the suspicion of fabrication being thus precluded. Slight incidental hints, therefore, and oblique allusions to any fact have often much more weight than distinct formal assertions of it.—*Whately's Rhetoric*, Part I, Chap. II, § 4.

ready and equally copious upon all points." "It must always be borne in mind," says Mr. Taylor, "that in the actual occurrences of human life, nothing is inconsistent. Every event which actually transpires has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed. In all this, perfect harmony prevails, so that a man can hardly invent a story, which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false." It is in fact as difficult to make a falsehood fit in with all the surrounding circumstances to which it must be adapted, as it is to fill up a hole made in the middle of a web of cloth so that no traces of the joining may be visible. It is impossible to take the threads of the warp and the woof and weave the rent or aperture over. It must needs be darned or patched, and the cleverest darning or the most skilful patchwork will show.

Is the evidence consistent with the common experience of mankind?

§ 33. We now come to the important test—Is the evidence consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with the well-known principles of human action? "As one principal ground of faith in human testimony is experience, it necessarily follows," says Mr. Starkie, "that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance[8] stated by Mr. Locke, that is asserted which is not only unsupported by common experience but contrary to it,

[8] The Dutch Ambassador told the king of Siam that the rivers of Holland were occasionally frozen so hard that an elephant might walk over on the ice. "Hitherto," said the king, who had had no experience of

belief is slow and difficult." The test of which I now speak will be most safely applied by the Judge, who has himself had the greatest experience; but, as the widest individual knowledge and observation cannot possibly extend over the whole field of human experience and as time develops many novelties, the possibility of the existence of which once appeared incredible, it will be necessary to avoid the Scylla of indiscriminate scepticism on the one hand, while endeavouring to steer clear of the Charybdis of unbounded credulity on the other. The story of the Dutch Ambassador and the king of Siam will be well borne in mind by Englishmen, who have been appointed to judicial office in India. They will find much that is either new to them or contrary to their own preconceived ideas; and will at first have need to be cautious and careful to a degree, while, even long after they have passed their novitiate, they will do well to remember the remarks of the Roman poet—"No man was ever endowed with a judgment so correct and judicious, but that circumstances, time, and experience would teach him something new, and apprise him that of those things, with which he thought himself the best acquainted, he knew nothing; and that those ideas which in theory appeared the most advantageous were found, when brought into practice, to be altogether inapplicable."[9]

Omissions.

§ 31. It will often be necessary to consider the effect of *omissions* in the testimony of witnesses; and in determining how far an indication of truth or falsehood is thus obtainable, it will be important to see whether the omission to mention a particular fact arises from wilful suppression, or from the witness's attention being rivetted upon some other facts, with describing which his mind has been wholly engrossed.[1] If the fact be one which could not possibly have escaped his observation, supposing him to be a true witness, and if, on being indirectly questioned, he evince no knowledge

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such a phenomenon, "I have believed the strange things you have told me, but now I am sure you lie"—Book IV, Chapter XV.

[9] Terence.

[1] See *Wills on Circumstantial Evidence*, p. 292.

of it, or, being directly questioned, deny such knowledge, the supposition of inadvertence is scarcely possible, and a discrepancy is apparent. The negative circumstance[2] also of a witness's *omitting* to mention such things, as it is morally certain he *would* have mentioned, had he been inventing, adds great weight to what he does say. Besides the consideration of omissions in the testimony of individual witnesses, it is necessary also to estimate the effect of omissions in the evidence taken as a whole. If a single witness attest several circumstances, each of which is capable of corroborating evidence, and if no such corroborating evidence is produced, there must be great confidence in the integrity and veracity of this single witness before we can believe all these circumstances on his sole testimony, where, if they were true, there would naturally be concurrent evidence to strengthen and confirm his statements.[3] The instance of a single link in a chain of proof being wholly wanting requires no particular comment. Where a case is supported by several parallel chains, the want of a link in any one of them renders that particular one wholly useless, and throws the whole strain on the others; but where the entire weight depends from a single chain only, the failure of one link, however strong the remaining links may be, must be fatal; and even where the link is not wholly wanting, but merely partly defective, it is well to remember that a chain is not stronger than its weakest part. There is, however, one omission which it is important to notice, inasmuch as a wrong construction is daily put upon it in the lower Courts in India. I speak of the non-production of *all* the evidence which it is possible to offer of any particular fact. From this no adverse conclusion can properly be drawn, if the evidence actually given be sufficient and be unimpeached. In the case of *Ramalinga Pillai* v *Sudasiva Pillai*, 9 Moo. I. A. 516; 1 W. R. P. C. 25, their Lordships of the Privy Council said:—"Several witnesses, whose testimony is not directly impeached, deposed to these facts; but it was urged in argument that many other persons were

[2] *Whately's Rhetoric*, Part I, Chap. II, § 4.

[3] See *Gilbert on Evidence*, p. 180.

present on the occasion, who ought to have been produced on the part of the respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced."

§ 35. Analogous to the subject of omissions is the consideration of statements, arguments, and evidence directly put forward and remaining *uncontradicted* by the other side. This is a sort of negative testimony given by *adversaries*, which is often of considerable weight. The direct testimony of adversaries is, of course, of still greater weight. In India such evidence going immediately to the point at issue is not often met with; but, as falling under the head of 'undesigned,' it occasionally presents itself, and may be at times educed by a little skilful examination. In the testimony not of adversaries only, but also of unwilling witnesses, it will generally be found that this consists more in something *incidentally implied* than in a distinct statement. It will, however, sometimes happen that even an adversary will admit something that makes against him in order to contest some other point to his thinking more important.[4] One way in which a hostile witness may, and often does, serve the case which he came to damage, is when he appears not himself to believe[5] or not to understand the thing he is reporting, when it is such as is to his hearers not unintelligible nor incredible by reason of their superior knowledge either generally or in the particular case.

Testimony of adversaries.

§ 36. It occasionally happens that the unreliability of a witness's testimony is shown by his *proving too much*. In his eagerness to assist the side on which he is called, he states some fact which to him in his ignorance appears calculated to promote this result, but which, taken with other facts proved or admitted, has a tendency directly the opposite, and lets in the light on the scenes behind, which have been carefully kept from view; or he makes a statement from which is deducible not only the conclusion sought to be established, but another which

Witness proving too much.

[4] See *Whately's Rhetoric*, Part I, Chap. II. § 4.

[5] *Idem.*

is absurd or inadmissible.[6] In the case of *Suriah Row v. Cataghery Buchiah*, 2 Moo. I. A. 126, Lord Brougham thus remarked on this subject :—' The observation one cannot help making upon this evidence is, that it proves too much on behalf of the defendant, who gives that suspicious evidence; in answer to which it is ingeniously suggested, as it is often under the pressure of the cause, that it cannot be supposed that the witness was suborned, for that, if he was possessed of common shrewdness, he would not have over-done the thing, and thus have given rise to such an objection. This is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance upon it; for we do find, happily for the ends of justice, that men *do* fall into these inconsistencies, and by means thereof the fraudulent character of the evidence becomes apparent. In the opinion of their Lordships, no reliance can be placed upon that remark to rebut the observation to which it is applied."

Danger of attempting to prove too much in a case.

§ 37. In connection with the same point I may remark upon the danger of attempting to prove too much, of ever advancing more than can be well sustained; since the refutation of *that* will often quash the whole. A guilty person may often escape by having too much laid to his charge; so he may also by having too much evidence against him, *i.e.*, some that is not in itself satisfactory:[7] thus a prisoner may sometimes obtain an acquittal by showing that one of the witnesses against him is an infamous person or actuated by some malignant motive, though, perhaps, if that part of the evidence had been omitted, the rest would

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[6] "It is evident that either the *premiss* of an opponent or his *conclusion* may be disproved, either in the direct or in the indirect method; *i.e.*, by proving the truth of the *contradictory*, or by showing that an absurd conclusion may fairly be deduced from the proposition you are combating. When this latter mode of refutation is adopted with respect to the *premiss*, the phrase by which this procedure is usually designated, is that the 'argument proves too much,' *i.e.*, that it proves, be sides the conclusion drawn, another which is manifestly inadmissible." — *Whately's Rhetoric*, Part, I, Chapter III, § 7.

[7] This is very common in criminal cases in India.

have been sufficient for conviction. An argument, or a piece of evidence which has been refuted, ought, strictly speaking, to go for nothing. The conclusion sought to be established thereby may be quite true, and may be capable of being established by other arguments or other evidence. Yet men—and judicial functionaries in common with other men—are apt to take for granted that the conclusion itself is disproved when the arguments or evidence brought forward to establish it have failed or have been satisfactorily refuted. The mistake arises from assuming that these are *all* the arguments that could be urged.[8] If they are *all* the arguments or evidence advanced in that particular case, of course the Judge is right, inasmuch as he is bound to decide *secundum allegata et probata*; but if there are other arguments and other evidence in the case, he must not let his attention be wholly diverted from *these* by the address of an advocate, who directs his attack against these portions only of the adversary's case, which cannot be maintained. A wise general will abandon those outworks which he knows to be incapable of defence, or the attempt to defend which may endanger the safety of his main position: but in the contests of the *forum*, more especially of the

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[8] See *Whately's Logic*, B. III, § 18; and *Rhetoric*, Part I, Chapter III, § 7. There is an error somewhat similar in kind, which is very common amongst judicial officers in the Mufassil. The allegation of the plaintiff and the allegation of the defendant are taken and coupled together by a disjunctive to form an issue, which stands thus—"Whether the story of the plaintiff or the story of the defendant is true?" and the judicial officer proceeds to decide which story is false or unproved, taking it for granted that if one story be false or unproved, the other must be true. But in a very large proportion of cases this by no means follows. The proper issue is single, not double—is the allegation of the party, upon whom the burden of proof lies, true? The allegation of the other side may be true and still it may not follow as a necessary conclusion that the first allegation is false; or it may be false, and still there may be no necessary inference that the first allegation is true, for it may be false for one of many other reasons besides that which has been put forward and has failed. For an illustration of the danger of this double issue, see *Amir Bepari v. Hari Mohan Karmokar*, 23 W. R. 87. See also the remarks of the Privy Council in *Chandranath Rai v. Ramjai Mazumdar*, 6 B. L. R. 307-8.

Indian *forum*, this caution and care are frequently wanting, a fresh duty being in consequence imposed on the Judge as the *arbiter* of the result.

Affirmative and negative evidence.

§ 38. When one witness deposes to a certain fact having occurred, and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative. In the case of *Chaudhri Debi Prasad and Beni Prasad* v. *Chaudhri Daulat Singh*, 3 Moo. I. A. 357, their Lordships of the Privy Council made the following observation:—"In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time." When a witness deposes to his own turpitude, little or no faith is to be placed in his testimony. In *Kali Chandra Chaudhri* v. *Sib Chandra Bhaduri* (6 B. L. R. 507) their Lordships said they were of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them.

Witness deposing to his own turpitude.

Witnesses to be weighed, not numbered.

§ 39. As a general rule, a Judge should *weigh* not *number* witnesses. The tendency of modern improvements in the rules of evidence has been to admit every kind of evidence, leaving it to the Court to form its own opinion of the weight to be assigned to the evidence when admitted. The old Evidence Act (s. 28, Act II of 1855) enacted that, except in cases of treason, the direct evidence of one witness, who is entitled to full credit, should be sufficient for proof of any fact: and the present Act (s. 134, *post*) enacts that no particular number of witnesses shall, in any case, be required for the proof of any fact. The number of witnesses, therefore, is a less important consideration than the weight to be attached to the individual testimony of each or to the sum of the testimonies

of all taken together. But the number of witnesses may nevertheless, under certain circumstances, be of very great importance. "Where direct testimony," says Mr. Starkie, "is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury than that one or a few should be mistaken or wilfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied." The first portion of these remarks applies with far less force in India than in England; but the latter portion is equally applicable in both countries. In false cases in India there is generally no lack of witnesses; and any deficiency in the *weight* of the witnesses individually is sought to be made up by *number*. In fact, one mark of a false case is not uncommonly the extraordinary number of persons who are said to have seen some occurrence, which in the natural course of things would have been witnessed by a limited number of persons only. At the same time cases sometimes arise which illustrate the truth of the remark that two or three persons are far more easily found than a larger number, who, from motives of interest or malignity, will combine to aggrandize themselves or to ruin an opponent. Their story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. It is on this account that the uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c., or are known, like accomplices, to be persons of bad character, and to have an interest in the result, have ever been regarded with merited distrust, and are now, in practice, generally

deemed insufficient to warrant a conviction.[9] It sometimes happens that several witnesses are called, and appear to be bearing concurrent testimony to the same thing, when they are really attesting different things, one witness being called to prove one of the facts, and another witness to prove another of the facts, which go to make up the entire case; but two witnesses being never called to prove the same fact, lest they should contradict each other on cross examination.

Value of testimony of Indian witnesses.

§ 40. I now pass to some remarks concerned more especially with Indian *witnesses*, and the value to be attached to their testimony. There would appear to be an opinion pretty generally prevalent,[1] that witnesses in India are more mendacious than witnesses in other countries; and it has been repeatedly stated that Judges in India have a far more difficult task to perform than Judges in England in consequence of the untruthful nature of the evidence with which they have to deal. Some persons have even gone so far as to say that while the presumption in England is that witnesses tell the truth, the presumption in India ought to be that they lie. In the case of *Rungama* v. *Atchama*, 4 Moo. I. A. 106, their Lordships of the Privy Council observed as follows:—"These instruments are produced, and the facts tending to this conclusions are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony beyond the observation which may be made on all Hindoo testimony, that perjury and

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[9] Tay. Ev., Vol. I, § 53; § 67, 8th edn.

[1] "Thus it has been justly observed, that a propensity to lying has been 'always, more or less, a peculiar feature in the character of an enslaved 'people,—accustomed to oppression of every kind and to be called upon to 'render strict account for every trifle done, not according to the rules of 'justice, but as the caprice of their masters may suggest. It is little to 'be wondered at if a lie is often resorted to as a supposed refuge from 'punishment, and that thus an habitual disregard is engendered.'—This passage is cited as accounting in some measure for the lamentable neglect of truth which is evinced by most of the nations of India, by the subjects of the Czar, and by many of the peasantry in Ireland:" Taylor, Vol. I, § 45; § 53, 8th edn.

forgery are so extensively prevalent in India, that little reliance can be placed on it." It would be possible to quote from other judgments, as well of the Privy Council as of the highest Courts in India, passages in which the great prevalence of perjury and forgery is admitted and lamented; but it is not within either the author's wish or the scope of his present subject to exaggerate the reproach of this particular immorality by multiplying proofs of its existence. At the same time, to make no allusion whatever to the evil would be inconsistent with the design of the present remarks, which are intended more especially to guide those who require guidance. It will then be sufficient to say that while on the one hand it would be a gross slander to predicate of all the natives of India, as of the Cretans, that they are liars, it would, on the other hand, be misleading the young judicial functionary to tell him that he may safely look for as much truth in an Indian as in an English witness-box.

§ 41. During the last half century education has been gradually bringing forth fruit; and one of its best fruits has been an increasing regard for truth among those classes who have had the benefits of education.[2] But no fruit has been produced where

[2] One of the best fruits of education (using the term in its widest sense) is to make truth respected and falsehood contemned. Wherever ignorance has prevailed, in the West or in the East, falsehood and perjury have flourished. Mr. Hallam, after noticing the prevailing ignorance of the Middle Ages, proceeds to describe the degradation of morals. His description contains the following passage—"One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury"—*Middle Ages*, Chap. IX, Part 1. Sir James Stephen says:—"According to my observation, the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts, and power of description, properly proportioned to each other, is much less common than people usually suppose it to be. It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such persons to distinguish between what they themselves saw and heard and what they were told by others, unless their attention is specially directed to the distinction"—*Introduction to Indian Evidence Act*, p. 44 *note*. The author's experience of Indian witnesses entirely corroborates the truth of these remarks.

no seed has been sown, and the great mass of the population, including more especially the lower classes, do not make a habit of speaking the truth, or regard falsehood with feelings of shame or abhorrence. Respectable natives do not, as readily and willingly as Englishmen, attend a Court of Justice to give evidence. Even in their own cases, where they have personal knowledge of the facts, they prefer calling or sending their servants or dependents to depose to them; and such persons are often more zealous for the success of a cause, the conduct of which is to a certain extent in their hands, than for truth. Again, the feeling of revenge, which is so strong in the breast of the Oriental,[3] is perpetually suggesting new ways of achieving that vengeance which is almost as dear as life:[4] and, in these days of law and order, a false case, by which a man may be deprived of his paternal lands or sold out of house and home, or even consigned to the inside of a criminal jail, is a common device with the native for obtaining his desire upon his enemy. Then, in India, every man has his own caste, separate profession and occupation; and as *thugs* take to *murder*, and *dakaits* to robbery, and *dancing girls* follow prostitution, so other members of the least moral portion of the community devote themselves to perjury and forgery, and are willing to hire their services to those who may require them. Just as an unscrupulous Italian will employ a professional assassin to remove his adversary from his path, so an unscrupulous native of India will employ a professional perjurer or forger to work out *his* particular scheme of vengeance; and the man who will not hesitate to pay the wages of this iniquity will occasionally himself scruple to forswear himself. It

Some causes of the want of truth in India.

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[3] To understand thoroughly the words "avenge me on mine enemy," one must have dwelt in the East.

[4] The annals of crime in India contain many instances of persons having *killed themselves* under circumstances from which it was clear that they intended it to appear that they were *murdered* by those with whom they were at enmity, in order that the latter might be punished for their murder.

would, however, be a great mistake to suppose that *all* natives of India are addicted to these vices in which *some* natives indulge and for which *some* districts are notorious. The upper and more educated classes are as free from them as the same classes in other countries of equal civilization; and they regret their existence among their less enlightened countrymen.

§ 42. From what has just been said, it will be evident that judicial functionaries in India should be most careful in the oral examination of witnesses. If, however, care be exercised and ordinary attention be devoted to this duty, the author is persuaded that the task of discovering the truth is not a very difficult one in the great majority of cases, or impossible in any. Few men are really good actors: and there is a remarkable difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw, and that of a witness who repeats from memory a story which has been taught him. The former, while detailing what his eyes have seen, throws an unmistakable vitality into his narrative—his eyes are lit with intelligence, his features are all in motion, his hands make unconscious indications, no part of his body is wholly at rest,—and all these combined together produce a series of pantomimic gestures, illustrative and corroborative of the details of his narrative.* The latter, on the other hand, either stands perfectly motionless or is fidgety and restless; his features are impassive; the pupil of the eye is fixed; he gazes at empty space, instead of watching the face of the Judge or of the examining advocate to see if he is understood; he hurries on with his story lest he should lose the thread of it, and is impatient of interruption; occasionally as he forgets his cue, the dry white tongue is thrust hurriedly out and as hurriedly withdrawn, or the apple in the throat rises and as suddenly falls; and his whole attitude and

Demeanour of witnesses.

* The above description will apply more or less exactly according to the *race* to which the witness belongs. The majority of witnesses in India (Bengal at least) are—like, but not so much as, Irish peasants—demonstrative when describing what they have seen.

demeanour cannot fail to remind his hearers of a school-boy repeating, in the presence of a stern pedagogue and with the fear of the rod before his eyes, a task which he has learned by rote.

Other indications of truth or falsehood.

§ 43. The following passage from Mr. Taylor's work exhibits another picture, many of the lines of which are also true in India:—"While simplicity, minuteness and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct. So, when we find a witness over zealous on behalf of his party; exaggerating circumstances; answering without waiting to hear the question, forgetting facts where he would be open to contradiction; minutely remembering others, which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively or flippantly; pretending not to hear[6] the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God,[7] and protesting his honesty—we have indications, more or less conclusive, of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection."[8] To the same effect, though in somewhat different language, Starkie writes:—"An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration

[6] In India, a witness will, with the same object, pretend not to understand the Judicial officer when speaking in the language of the country, though he has understood and answered every question previous to the crucial one. Whether he has readily understood and answered previous questions is always important.

[7] In India, not infrequently a witness spontaneously prefaces his evidence by a declaration that he will tell the truth only, and on no account say anything that is false. I have occasionally found this to be the prelude to more than usual mendacity.

[8] Vol. I. § 44 : § 52. 8th edn.

of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question for the purpose of gaining time to consider the effect of his answer; precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; and affectation of indifference—are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity."

Interrogative test of Indian witnesses.

§ 44. I have already mentioned the fact that true as well as false witnesses are not infrequently *prepared* in India. Both may, therefore, display the same volubility in the witness-box; but the difference between the true and the false witness becomes very apparent when each is stopped in repeating the story committed to memory and is compelled to answer questions. The true witness may be a little put out at first; but he has a fund of real ideas to fall back upon, and he quickly recovers himself and gives natural and intelligent answers. The false witness, on the other hand, knows only the story he has been taught, and his perplexity and embarrassment are too obvious to escape notice, as he racks his memory, perhaps in vain, to try and nd in what he has learned by rote suitable replies to the questions that are put to him. Another way of treating a witness suspected of being mendacious is to forbear to express the impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some irretrievable contradiction at variance with other parts of his own story, or with facts notorious in themselves or established by proof from other

sources.[9] Away from large towns and other haunts of professional witnesses, many of the witnesses who come before the Courts in India are ignorant peasants; and, however carefully they may be prepared, their limited capacity makes it almost impossible for them, if properly examined, to carry a false story successfully through all its stages, more especially if it take them at all out of the experiences of their own every-day life and into matters which are to them strange and unfamiliar.[1] Before leaving the subject of the demeanour of witnesses, I may remark that the Codes of Civil and Criminal Procedure require the Courts to record such remarks as they may think material respecting the demeanour of witnesses while under examination. The object of these provisions is to make up in some respect for the deficiency under which Courts of Appeal must labour in having merely the dead record before them, and not seeing the living witnesses.

Directing witnesses to withdraw.

§ 45. When it appears essential for the elucidation of the truth, the witnesses should be examined out of the hearing of each other. An order for all the witnesses on both sides to withdraw, except the one under examination, should generally be made upon the motion of either party at any period of the trial. If a witness remain in Court in contravention of this order, it is under English law a contempt and may be punished accordingly. A Judge cannot reject the testimony of a witness, who has thus remained in Court, though his disobedience ought to be recorded and may materially lessen the value of his testimony. In India a *witness-room* where the other witnesses can be kept out of hearing of the witness under examination, ought to be attached to every Court.

Confronting of witnesses.

§ 46. When the testimony of witnesses called on opposite sides is directly conflicting, it is occasionally a good plan to confront them. "This practice," says Mr. Taylor, "which still prevails largely in the County Courts, and is there often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse

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[9] *License of Counsel*, p. 5.

[1] And see remarks at p. 36, *ante*.

at Nisi Prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth." In India, where the evidence is so often directly conflicting, this is a most valuable means of discovering the truth, and the author has often adopted it with success.

Ability of witnesses.

§ 47. In connection with demeanour, it is very important to consider the ability of the witness, as well his intellectual capacity as his powers of perception, judgment, memory, and description.[2] Where cognizance of the fact related has been obtained through the sense of sight, the light in which the object was placed is important. Different degrees of weight would properly be attached to identification made in broad daylight, by moonlight, by the light of the stars, and during the darkness of the night; and the fact of the person identified being previously known or otherwise to the identifier, is also important. In the case of hearing, the sounds which reached the ear may have been faint; or of the sounds produced by the sonorous body, parts only, and those broken and interrupted, may have reached the ear. In the case of words spoken, the voice of the speaker may have been faint, the distance at which he stood considerable; and some of his words may have excited, while others failed to excite, a distinct perception. If the fact and its circumstances were of such a nature as to be likely to attract the witness's attention, his perception is likely to be the more clear and distinct; while the contrary will be the case, if the transaction was remote or unlikely to excite notice and observation. 'Had the witness any motive or object,' is also important in connection with the degree of attention given to the transaction. Again, perception may have been rendered faint or indistinct by old age. Attention may have been rendered

[2] See the following subject discussed more at large by Bentham, p. 162 and following pages: and by Starkie, p. 824. I have borrowed from both.

indifferent; judgment hasty, negligent, and erroneous, by want of knowledge, general or particular, absolute or relative—the fruit of relative experience, observation, information, and meditation. In connection with the same subject, Archbishop Whately observes thus:—"When the question is as to a fact, it is plain we have to look chiefly to the honesty of a witness, his accuracy and his means of gaining information. When the question is about a matter of opinion, it is equally plain that his ability to form a judgment is no less to be taken into account . . . ." And again—"Even when the question relates to what is strictly a matter of fact, the intellectual character of the witness is not to be wholly left out of the account. A man strongly influenced by prejudice, to which the weakest men are ever the most liable, may even fancy he sees what he does not. And some degree of suspicion may thence attach to the testimony of prejudiced, though honest, men *when their prejudices are on the same side with their testimony*, for otherwise their testimony may even be the stronger . . . . . It is most important, therefore, to remember what is often forgotten—that credulity and incredulity are the *same* habit considered in *reference to different things*. The more easy of belief any one is in respect of what falls in with his wishes or preconceived notions, the harder of belief he will be of anything that opposes them."[3]

Memory considered.

§ 48. "Another intellectual cause of incorrectness in human testimony," says Bentham,[4] "is failure of memory. A failure of this sort may have had for its cause either some original faintness or indistinctness in the act or acts of perception, or else the lapse of time, the length of the interval between the point of time at which the fact presented itself to the perception of the witness, and the point of time at which it happens to him to exhibit his statement of it for the information of the Judge. From the weakness of the memory may result two different and in some respects opposite effects—non-recollection and false recollection." As to the latter he

[3] *Whately's Rhetoric*, Part I, Chap. II, § 4.

[4] Page 165.

remarks further on:—"Without the least false consciousness as to any point whatever, without any intention or desire of departing in any point from the strict line of truth, a supposed recollection may be false, not only in quantity, quality, or other circumstance, but even *in toto*. I can speak from experience: recollection false even *in toto* is what it has, every now and then, happened to me to detect myself in. I should expect to find this to be the case more or less with everybody. I speak of recollection devoid of all importance, and the expression of which has never gone forth, nor been intended to go forth, out of my own breast; and in respect of which all inducements to mendacity, all causes of bias, have consequently been out of the question. One circumstance, however, has been common to all these instances of mis-recollection and false recollection: the image of the supposed transaction has been faint and dubious. It has been deduced, as it were, in the way of inference, from some real and better recollected facts, which have operated as evidentiary facts with relation to these false ones. It might be regarded as the work of the imagination, were it not for its having a distinct and solid ground to rest upon in the truth of things. . . . . On the other hand, when the recollection, the internal evidence, is clear and strong to a certain degree, there is no room left for any such external evidence to operate. . . . . A recollection which is false in circumstance only, may be so either by being superadded to such parts of the recollection as are true, or substituted to one or more of them. . . . . A recollection false *in toto* is as easy to describe and conceive as a recollection false in circumstance. It, however, scarcely admits of being realized."

Descriptive powers of witness.

§ 49. The ability of a witness may be defective neither in perception, judgment, nor memory; but he may be unable to describe accurately what he has seen, and the image of which is clear to his own mind. "The picture of the fact," says Bentham, "as painted in the memory of the witness at the time of deposition, may be ever so correct; yet if the copy exhibited by the words and other signs employed by him for the expression

of it be otherwise than correct, such accordingly will be his evidence. By an infelicity in the expression, the fruit of the most correct perception and the most retentive memory may be rendered abortive." And if the copy may be incorrect when the witness speaks the same language as the Judge, how much greater room for incorrectness is there when the vernacular of the witness and of the Judge are different, and, by a process of mental translation, there is presented to the Judge's mind *a copy of the copy* produced by the witness! The danger of inaccuracy in this respect, when European Judges sit to administer justice in a language foreign to them, cannot be over-exaggerated or too carefully guarded against. Bentham further remarks that *timidity* is, in the case of *vivâ voce* examination, perhaps the most frequent cause of incorrectness in the expression. This timidity may arise from inferiority in respect of rank, sex, or age, or from the natural constitution of the individual. In connection with the present topic may also be considered Archbishop Whately's remark that persons unaccustomed to writing or discussion, but possessing natural sagacity and experience in particular departments, have been observed to be generally unable to give a satisfactory reason for their judgments, even on points on which they are actually very good judges.[5] And it may be added that the same persons are often incapable of describing clearly what they thoroughly understand.

Admixture of falsehood with truth, common in India.

§ 50. One of the commonest cases in India, and by far the most difficult to deal with, is where falsehood is admingled with truth. This happens in various ways and with different objects. Sometimes the story concocted is to all intents and purposes false, having reference to the purpose for which it is used, although it may have been reared upon a true basis. "If an individual," said Lord (then Mr.) Brougham, on the occasion of a celebrated trial, "were to invent a story entirely—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a

[5] *Rhetoric*, Part I, Chap. III, § 1.

little truth, he may raise a tale, which with a good deal of drilling, may put an honest man's life in jeopardy. . . . . .
The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much or to come too directly to the point; but to lay the foundation in existing facts and real circumstances—to knit the false with the true—to interlace reality with fiction—to build the fanciful fabric upon that which exists in nature—and to escape detection by taking, most especial care never to have two witnesses to the same fact and also to make the facts as moderate and as little offensive as possible." A common instance is an *alibi*, when sought to be proved for a prisoner's defence. Everything may be perfectly true except the *date*. The whole transaction described may have really occurred, and the prisoner may have been a chief actor or one of the actors in the scene, only on a day different from that stated by the witnesses. Again, it happens very commonly in India that a perfectly true case is sought to be proved by false witnesses and forged documents. The actual witnesses of the transaction may be dead, or may be persons who, from their position and from native ideas on these subjects, may be unwilling to come into Court and depose to what they know; or the persons who have charge of the preparation and management of the case, may be, as too often they are, wholly ignorant of the proper mode of proving the facts, which must be proved in order to succeed. Aiming only at success, they may be wholly unscrupulous as to the methods to be employed in attaining it; or conscious of the goodness of the cause which they have in hand, and justifying the means by the end, they may think it small harm to use crooked paths in order to secure ultimate justice. It may be also that the uncertainty and doubt which formerly hung over the rules of evidence binding on the Mufassil Courts, were in some respect responsible for the evils born of the darkness which they contributed to create.

§ 51. The duty of a Judge in a case of this kind is well pointed out by the Calcutta High Court in the following passage:—"The Court will bear in mind that the use of fabricated written evidence

by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue. The person using such evidence may have brought himself within the penalties of the Criminal Law; but the Court should not in a Civil suit inflict a punishment under the name of a presumption. Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause. In an appeal heard by the Privy Council (*Sarnamayi* v. *Salis Chándrá Rai Báhádúr*, 10 Moo. I. A. 149), their Lordships sustained the appeal, although they treated the whole of the parol evidence of the appellant as unworthy of credit, and a confirmatory pattá produced by her as a forged instrument. In the judgment it is said, 'that when false witnesses or forged 'documents are produced in support of a case, the fact naturally 'creates suspicion as to the case itself; and if the evidence, upon 'which their Lordships act, depended in any degree for its credi- 'bility or weight on such witnesses or documents, they would have 'paused as to their conclusion. The fact is not so, however, in the 'present case: their Lordships believe they have to deal with a 'just case foolishly and wickedly attempted to be supported by 'false evidence. This misconduct must not mislead them in the 'advice they will have to tender to Her Majesty, which will be that 'the appeal be sustained, and the decrees complained of reversed.'"[6]

The whole evidence not to be rejected because part is false.

[6] See also *Gharibúlla Ghazi* v. *Gúrú Das Rai*, 2 W. R. Act X, 99; *Bengal Indigo Company* v. *Tarini Prasad Ghosh*, 3 W. R. Act X, 149; and *Kutbu Mahomed* v. *Hardeb Das*, 19 W. R. 107.

A case may be true though sought to be supported by perjury or forgery.

§ 52. In the case of *Wise* v. *Sandalunissa*, 11 Moo. I. A. 177, their Lordships of the Privy Council said :—"In a native case it is not uncommon to find a true case placed on a false foundation and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it by fabrication of evidence and subornation or tutoring of witnesses and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. . . . . A native, even with an honest case, or his advisers, may fabricate evidence to meet a case, which they fear, though they know it to be groundless."[1] In another case the same high authority remarked as follows :—"That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or law" (*Pattabhiramier* v. *Vencatapoer Naicken*, 7 B. L. R. 142). And again—"It might be possibly an advantageous rule if, as Mr. Scott expresses in his judgment, that where a party 'has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not liberty to assume for him a position which he has himself rejected.' But their Lordships are unable to arrive at that conclusion, and are apprehensive that, if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party. . . . . We find also in a recent case, *Rani Sarnumayi* v. *Maharaja Satish Chandra Rai*, this Committee gave effect to the defendant's

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[1] The author has heard of a case in which a native forged a bond for a considerable amount, and with the help of false witnesses sued his adversary thereon; who, despairing of showing the falsity of the plaintiff's case, admitted the bond, forged an acquittance and produced an equal number of witnesses to prove this document!

title, although a document by which she sought to strengthen it was found to be a forgery. The evidence which is not susceptible of being forged is *primâ facie* strongly in favour of the defendant. However much the want of trustworthiness in the evidence of cases from India is to be regretted, we cannot, by reason of the proof that a document adduced by one party is forged, transfer the property, in which he and those through whom he claims have beeuin possession at the date of the suit for forty-four years, to another, who has not, in the opinion of their Lordships, established any right to it himself."—(*Sevaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chenna Nayana Cheiti*, 10 Moo. I. A. 161—163).

§ 53. In connection with the same subject, but more especially with reference to the testimony of individual witnesses, Mr. Norton well observes thus :—"There is a maxim—*falsus in uno, falsus in omnibus*,—false in one particular, false in all. I need hardly say that this is everywhere a somewhat dangerous maxim, but especially in India; for, if a whole body of testimony were to be rejected, because the witness was evidently speaking untruth in *one* or more particulars, it is to be feared that witnesses might be dispensed with; for, in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence; and it *may be* so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point." The case will, however, be different if one of the essential circumstances in the story be clearly unfounded. This, to use a felicitous expression of Mr. Hallam's, "is to *pull a stone out of an arch*: the whole fabric must fall to the ground."[8]

Danger of the maxim "Falsus in uno, falsus in omnibus."

[8] "The tendency of any mixture of error in testimony is to lessen the probability of the whole. This diminution is in many cases so small as

Danger of doubting all native evidence.

§ 54. Some judicial officers in India are apt to commit the mistake of disbelieving almost all evidence that is brought before them. Convinced of the general unreliability of native evidence, they suspect every witness and doubt every document produced in every case; and not unfrequently their administration of justice resolves itself into a sceptical scrutiny of the evidence presented to them, in which, if they find some traces of falsehood, they immediately reject the whole. This happens not infrequently at the second stage of a judicial career (the first stage being generally that of too implicit belief), before riper knowledge of the country and its usages and maturer experience of native habits, manners, tendencies and proclivities have taught the happy medium that lies between the two extremes. The following observations of the Lords of the Privy Council are directed against this erroneous mode of exercising the judicial office:—"It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion; and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, nor unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *vivâ voce*, how necessary soever it may be always to sift such evidence with great minuteness and care."[9] And in another case:—"Had their Lordships found that his (*i.e.* the Judge's, who tried the case in the first instance) observations upon the witnesses themselves were opposed to the opinion

not perceptibly to affect our belief. But where an essential circumstance in a story is evidently unfounded, it is to *pull a stone out of an arch*: the whole fabric must fall to the ground."—*Constitutional History of England*, Vol. II, p. 637.

[9] *Madhu Sudhan Sandyal* v. *Sarúp Chandra Sarkar Chaudhrí*, 4 Moo. I. A. 441.

of the Sádr Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities But if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of native testimony to say, despite of this positive testimony, we will put all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties"[1]

§ 55. The following remarks, made in another case, are also pertinent :—"This evidence is wholly uncontradicted, and yet, surely, if capable of contradiction, some evidence might have been adduced to impeach its credibility—some evidence either to show that the facts did not take place as stated, or to throw a doubt upon the testimony as to the handwriting We have no such evidence, we must, therefore, necessarily come to the conclusion that the genuineness of the document is established. It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence. Such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it."[2] And again —"Their Lordships are led by the judgment under review, and by some portion of the argument which has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must

Uncontradicted evidence not to be discarded.

[1] *Wise* v. *Sandalunissa Chaudhrani*, 11 Moo. I A 187

[2] *Banwari Lal* v. *Hetnarain Singh*, 7 Moo. I A 167

not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight must be given to evidence there as elsewhere: and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others *to the suspicions and not to the deliberate judgment* of their appointed Judges. Nor must an entire history be thrown aside, because the evidence of some of the evidence of some of the witnesses is incredibile or untrustworthy."[3]

Peculiar tests of written instruments.

§ 56. With respect to written instruments and the possibility of testing the genuineness of the evidence derivable therefrom, the following observations are most valuable:—"Amongst other arguments urged for the respondents, it was said that, with regard to instruments of this kind, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, *the probability or improbability of the transaction* formed a most important consideration in ascertaining the truth of any transaction relied upon. With this argument we agree; and therefore it will become our duty to examine with care how far the defence relied upon is consistent with all the probabilities of the case. It has been said also that this defence stands exclusively upon oral evidence; and though, to a considerable extent, that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon the proof of a given instrument; but there is a very clear distinction, and not an unimportant one, between pleading a written instrument as an answer to a demand, and the setting up a defence founded

[3] *Ramamani Ammal* v. *Kulanthai Natchiar*, 14 Moo. I. A. 351.

exclusively upon oral evidence; for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it; but where the defence is rested upon a written document, as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence; and moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence. There are more means of trying the genuineness of a written instrument than there can be in disproving purely oral evidence. This is quite manifest even upon the present occasion, for the truth of the transaction may, as it has been, be investigated by reference to the handwriting, to the seal, to the stamps,[4] the description of the paper, and the alleged habits of him who is said to have written it."[5]

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[4] Some years ago, the author discovered a forgery, in a case which came before him in appeal, by examining the stamp. A conveyance purporting to have been executed in 1855 was engrossed on a stamp-paper bearing the Royal Arms of England with V. R. and a crown above. *This paper was not manufactured till* 1859, when Her Majesty assumed the Government of India. The paper in use previously bore the Arms of the East India Company with the letters $\frac{I}{E.\ C.}$ The forger had partly erased the letters V.R. and the crown; but the minute device on the Arms and the difference of the motto wholely escaped him. The author has also more than once detected forgeries by the presence or absence of the distinguishing mark impressed on stamps issued before the Mutiny—see Act XIX of 1858. It would be very easy to mark all stamp-paper with the date of issue by means of an instrument, such as is used to mark Railway tickets: and the author is convinced that this simple contrivance would do much to stop forgery by facilitating detection. In a large number of forgeries, it is necessary to antedate, and the difficulty of procuring a stamp with a suitable date could be increased if stamp-vendors were made to account more strictly for their sales than is at present the practice. The check of having the purchaser's name endorsed on the stamp is useless, as fictitious names are used. The author has detected more than one stamp-vendor having stamp-paper *ready endorsed* with such fictitious names.

[5] *Banwari Lal* v. *Hetnarain Singh*, 7 Moo. I. A. 155.

§ 57. It is grave error for a Judge to decide a case upon his own suspicions, or upon mere supposition, instead of upon the evidence which the parties have produced. In the case of *Sriman Chandra Dey* v. *Gopal Chandra Chakravartti*[6] the Lords of the Privy Council said:—"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests, *not upon suspicion, but upon legal grounds established by legal testimony.*" In *Kali Chandra Chaudhri* v. *Shib Chandra Bhadari*, 6 B. L. R. 501, it was said:—"Their Lordships are of opinion that, although no doubt it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery." In *Olpherts* v. *Mahabir Parsad Singh*, L. R. 10 I. A. 30, the Calcutta High Court had, on appeal, set aside an execution-sale on the ground that substantial injury had been caused to the judgment-debtor by the irregularity of the non-specification of the Government revenue in the sale proclamation. There was no evidence whatsoever on this point, and the Privy Council in recommending the reversal of the decision of the High Court said:—"It appears to their Lordships that the High Court could not, without evidence and upon mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale." In the case of *Ramanani Ammal* v. *Kulanthai Natchiar*,[7] we have already seen, it laid down that evidence in a particular case is not to be rejected from a general distrust of native testimony, nor is perjury to be

Suspicion not to be substituted for evidence.

[6] 11 Moo. I. A. 28. The above passage was quoted with approbation and followed in the later case of *Faiz Baksh Chaudhri* v. *Fakiruddin Mahomed Ahasan Chaudhri*, 9 B. L. R. 458.

[7] *Supra*, p. 64, *note*.

widely imputed without some grave grounds to support the imputation, because such a course would submit the decision of the rights of others to the *suspicions* and not to the deliberate judgment of the Judge. The proper course for a Judge to take in India, when he suspects the truth of the evidence produced before him, is to test that evidence with additional caution, to examine the witnesses with greater care, and, if necessary, to use the powers[8] with which he has been vested in this behalf for the purpose of obtaining greater light.

Judge may not import his own knowledge into a case.

§ 58. It is also an error for a Judge to import his own knowledge into a case or to base his decision in any way upon information obtained otherwise than from the evidence submitted to him by the parties in the cause. In the case of *Haroprasad* v. *Sheo Dyal*, L. R. 3 I. A. 286, the Privy Council said:—"It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment, as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness." In another case, (*Mithan Bibi* v. *Bashir Khan*, 11 Moo. I. A. 213), the same tribunal observed that the conclusion of the Judge seemed to rest principally on his own knowledge and belief or public rumour—"grounds upon which no Judge is justified in acting."[9]

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[8] See sections 252, 342 and 540 of the Code of Criminal Procedure; sections 165 and 171 of the Code of Civil Procedure; *ante* page 37, note; and section 165 of the Evidence Act, *post*, and note thereto.

[9] See also *Surja Kanth Acharjya* v. *Khudi Narain Manna*, 22 W. R. 9, and note to sec. 121. It has been held that the same principle applies to an arbitrator (*Kanhai Chand Gosami* v. *Ram Chandra Gosami*, 24 W. R. 81). When an assessor based his opinion upon personal knowledge, unsupported by any evidence on the record, a Sessions Judge was held to have committed an error in importing this opinion into his judgment

§ 59. The judgment in a case must then be based upon facts which are relevant and duly proved in the proceedings in that particular case[1] but in dealing with the evidence produced by the parties to prove or disprove the facts in issue, there is great scope for the caution, the acumen, the ability of the Judge. Men differ as widely in discernment and penetration as in stature and physical strength. No rules drawn from the experience of others can supply the want of Nature's gifts or form an effectual substitute for personal experience; but here, as in other departments, powers may be assisted and individual experience supplemented by suggestions afforded by those who have laboured in the same field. In India especially, where the Judicial officer assumes his functions at a comparatively early age, a few such suggestions may prove particularly useful. First, then, to use the words of Baron Parke in *Asadúlah alias Shah Chaman* v. *Bibi Imáman*, 1 Moo I. A. 19: 5 W. R. P. C. 26—29, "there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider *what facts are beyond dispute*, and to examine *which of the two cases best accords with those facts* according to the ordinary course of human affairs and the usual habits of life."

Judgment to be based upon facts relevant and duly proved.

Which case agrees with those facts which are undisputed.

§ 60. Then, the *probabilities* of the case, the *probability or improbability of the transaction* alleged, may properly be considered in conjunction with the evidence and as a test of its truth or falsehood. In a

Probabilities of the case.

(*R.* v. *Ram Charan Karmokar*, 24 W. R. Cr. 28). As to jurymen, Mr. Taylor says:—"Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box or declining to interfere in the verdict"—see § 1244; § 1379, 8th edn., and sec. 294, Cri. Pro. Code.

[1] So enacted in the first proviso to section 165 of the Evidence Act—see *post*.

case already quoted[2] their Lordships of the Privy Council agreed with the argument that, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they may deem necessary for their interest and the extreme facility with which false evidence can be procured from witnesses, the probability or improbability of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon. In *Sri Raghunadha* v. *Sri Brajo Kishor*, L. R. 3 I. A. 176, it was intimated that if the Judge had refused to weigh the probabilities of the case because he believed one set of witnesses rather than the other, he would, in forming his belief, have excluded from his consideration that which ought to have entered into it. In *Banwari Lal* v. *Hetnarain Singh*[3] it was observed that it would be most dangerous to say that, *where the probabilities are in favour of a transaction*, we should conclude against it solely because of the general fallibility of native evidence. In another case[4] it was said—"it is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion, and when opposed by the *strong improbability of the transaction* to which they depose, or weakened by the mode in which they speak, it may be of little avail." Probabilities are thus an important element of consideration, where the evidence appears unreliable or is directly conflicting; but a case should not be decided upon probabilities alone, apart from the evidence which the parties have submitted to the Court.[5]

Danger of conclusion based upon part only of the evidence.

§ 61. It is an error (and one to which young Judicial officers especially are liable) to fix the attention almost exclusively on some striking portion of the evidence and allow the mind to be borne away to an impulsive conclusion, which a due

[2] See the remarks of the Privy Council in *Banwari Lal* v. *Hetnarain Singh*, *ante* p. 64.

[3] *Ante* pp. 64, 65.

[4] *Madhu Sudhan Sandyal* v. *Suraj Chandra Sarkar Chaudri*, *ante* p. 62.

[5] *See Lallah Jah* v. *Tallabmatul Zahra and others*, 21 W. R. 436.

regard to the other portions of the evidence should considerably modify, if not wholly alter. It will also be well to bear in mind the self-evident but often forgotten maxim that *Disbelief is Belief*; only they have reference to opposite conclusions: *e.g.*, to disbelieve the existence of a fact is to believe that it was feigned. "The proper opposite to *Belief*," says Archbishop Whately, "is either conscious *Ignorance* or *Doubt*, "and even Doubt may sometimes amount to a kind of Belief; since deliberate and confirmed doubt, on a question that one has attended to, implies a verdict of *not proven*—a belief that there is not sufficient evidence to determine either one way or the other. Many persons are of such a disposition as to be nearly incapable of remaining in doubt on any point on which they have once bestowed their attention. They speedily make up their minds and come to *some* conclusion, whether there are any grounds for it or not. Others, again, there are, who are capable of remaining in doubt as long as the reasons on each side seem exactly balanced; but not otherwise. Such a person, as soon as he perceives any—the smallest—preponderance of probability on one side of a question, can no more refrain from deciding immediately, and with full conviction on that side, than he could continue to stand, after having lost his equilibrium, in a slanting position, like the famous tower at Pisa. And he will accordingly be disposed to consider an acknowledgment that there are somewhat the stronger reasons on one side, as equivalent to a confident decision. The tendency to such an error is the greater, from the circumstance that there are so many cases in practice wherein it is essentially necessary to come to a *practical* decision, even where there are no sufficient grounds for feeling *fully convinced* that it is the right one.[6] A traveller may be in doubt and have no means

Propensity to hasty conclusions.

[6] There is a difference between *civil* and *criminal* cases. In Civil cases a preponderance of evidence justifies a decision in favor of one party, more especially where the right is doubtful or there is no *primâ facie* right on either side. In Criminal cases the evidence ought to be conclusive in order to conviction; and, when there is a doubt, the accused should have the benefit of it.

of deciding with just confidence which of two roads he ought to take; while yet he must, at a venture, take one of them. And the like happens in numberless transactions of ordinary life, in which we are obliged practically to make up our minds at once to take one course or another, even where there are no sufficient grounds for a full conviction of the understanding. The infirmities above mentioned are those of *ordinary* minds. A smaller number of persons, among whom, however, are to be found a larger proportion of the intelligent, are prone to the opposite extreme—that of not deciding, as long as there are reasons to be found on both sides, even though there may be a clear and strong preponderance on the one, and even though the case may be such as to call for a practical decision.

Opposite error of being unable to make up the mind to any conclusion.

As the one description of men rush hastily to a conclusion, and trouble themselves little about premises, so the other carefully examine premises and care too little for conclusions. The one decide without inquiring; the other inquire without deciding."[7]

§ 62. In considering the value of the evidence and the arguments thereupon, it is no less true in India than in England, that reviling and personality and false charges—attempts to suppress evidence and misrepresentation of argument—afford presumptions that the cause against which they are brought is, in the opinion of adversaries at least, unassailable on the side of truth.[8] Occasionally, however, these weapons, like perjury and forgery, will be found in India arrayed on the side of a good cause, owing to the ignorance or depravity of those who have the management of it. The tyro may exclaim that the task of discovering truth must be hopeless, if the marks of falsehood are to be found even on the side of truth; but time and experience will teach him that it is possible to separate the wheat from the tares. Even those who have had the benefit of experience will often be in *doubt*: but doubt, be it remembered, is wholly consistent with

Doubt consistent with accurate inference.

[7] *Elements of Rhetoric*, Part I, Chap. II, § 5.

[8] *Whateley's Rhetoric*, Part I, Chap. II, § 4.

sound inference and a right conclusion. "There are objections," said Dr. Johnson, "against a *plenum*, and objections against a *vacuum*, but one of them must be true." So there may be truth supported by irrefragable arguments, and at the same time obnoxious to objections numerous, plausible, and by no means easy of solution.[9] On this point also let me quote Archbishop Whately:—"It is in strictly scientific reasoning alone that all the arguments which lead to a false conclusion must be fallacious. In what is called moral or probable reasoning, there may be sound arguments and valid objections on both sides,—*e.g.*, it may be shown that each of two contending parties has some reason to hope for success, and this by irrefragable arguments on both sides, leading to conclusions which are not, strictly speaking, contradictory to each other; for, though only one party can obtain the victory, it may be true that each has some reason to expect it. The real question in such cases is, which event is the *more* probable—on which side the evidence preponderates? Now, it often happens that the inexperienced reasoner, thinking it necessary that every objection should be satisfactorily answered, will have his attention drawn off from the arguments of the opposite side, and will be occupied, perhaps, in making a weak defence, while victory was in his hands. The objection, perhaps, may be unanswerable, and yet may safely be allowed, if it can be shown that more and weightier objections lie against every other supposition."[1]

The *whole* evidence to be considered.

§ 63. In conclusion the Judge should endeavour to take a comprehensive view of *all* the evidence, all the probabilities on either side; comparing the *whole* of what is arrayed on one side with the *whole* of what is arrayed on the other side; and not suffering his mind and attention to be concentrated unduly on any one portion, lest he consider too perfunctorily or wholly omit to consider other portions either on the same side (where the effect of *combination* is important), or on the opposite side (where the effect of *contradiction* is of consequence). "The consideration of

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[9] *Dr. Hawkins on Tra*

[1] *Rhetoric*, Part I. Chap. III, § 7.

a case upon evidence," said their Lordships of the Privy Council,[2] "can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim, or defence, be viewed in connection with the oral or documentary proof, which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted." It may be that the generality of men are much better qualified for understanding (to use Lord Bacon's words) "particulars, one by one," than for taking a comprehensive view of a whole; and therefore in a *galaxy* of evidence, as it may be called, in which the brilliancy of no single star can be pointed out, the lustre of the combination is often lost on them. But in this as in other matters, labour and training, guided by advice and experience, may achieve very satisfactory results.

Proper object of a judgment.

§ 64. When the Judge, having fully considered the evidence, and arrived at his conclusion thereupon, proceeds to embody the result in a judgment, he may bear in mind the following observations of the Privy Council:—"Their Lordships consider that the voluminous judgment of the Civil Judge deserves the credit due to a most painstaking endeavour to arrive at the truth in a difficult case. But its excessive elaboration tends to impair its value by defeating *the proper object of a judgment*, which is to support by the most cogent reasons that suggest themselves the final conclusions at which the Judge has conscientiously arrived. This document records the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial, the effect, often temporary, upon him of a particular piece of evidence or argument of counsel; it subjects every witness to criticism more or less unfavourable; and from this mass of often conflicting statements, it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests."[3]

[2] In *Rajendra Kishwar Singh* v. *Seoparshan Misra*, 10 Moo. I. A. 153.

[3] *Sri Raghunadha* v. *Sri Brajo Kishor*, L. R. 3 I. A.,

THE

LAW OF EVIDENCE IN INDIA,

BEING

ACT I OF 1872,

AS MODIFIED UP TO THE 1ST MAY 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General in Council on 15th March 1872.)

Preamble.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows :—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Evidence Act, 1872:"

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

Commencement of Act

and it shall come into force on the first day of September 1872.

'British India' means the territories vested in Her Majesty by the 21st and 22nd Vic. cap. 106, sec. 1 (passed 2nd August 1858), with the exception

of the Straits Settlement, which, under the provisions of the 29th and 30th Vic., cap. 115, ceased to be part of India. (See Act I of 1868, section 2, cl. 9.)

The Act, therefore, applies to the Scheduled Districts (see Act XIV of 1874), as well as to other parts of British India.

Act I of 1872 has been declared in force in Upper Burma generally (except the Shan States) by Act XX of 1886, section 6; in the Hill District of Arakan by Regulation IX of 1874, section 3; in British Baluchistan by Regulation 1 of 1890, section 3; in the Baluchistan Agency Territories by the Baluchistan Agency Laws Law, 1890, section 4; and in the Santal Parganas by Regulation III of 1872 as amended by Regulation III of 1886, section 6: also (by notification under the Scheduled Districts Act, 1874) in the following Scheduled Districts, namely, the Districts of Hazaribagh, Lohardugga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum [*Gazette of India*, 1881, Part I, p. 504]; and the North-Western Provinces Tarai [*ib.*, 1876, Part I, p. 505].

The subjoined is a complete list of the Native States in India or places therein to which the Indian Evidence Act (I of 1872) has been applied by the Governor-General in Council.[1]

Names of places.	Notification or other authority.	Where published.
A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED.		
SOUTHERN INDIA.		
1. Bangalore . .	No. 2252-I., dated the 7th August 1883.	Native States Lists,[2] Southern India (Madras and Mysore), Ed. 1888, page 83.
2. Hyderabad Assigned Districts.	No. 212-I., dated the 24th October 1873.	Native States List, Southern India (Hyderabad), Ed. 1889, page 35.
3. Sikandarabad Cantonment.	No. 212-I., dated the 24th October 1873.	Ditto page 184.
4. Lands occupied by the Nizam's Guaranteed State Railways Company, the Great Indian Peninsula Railway, the Dhond and Manmad Railway and the Madras Railway in the Hyderabad State.	No. 1144-I., dated the 22nd March 1888.	Ditto page 247.
	No. 2065-I., dated the 22nd May 1889.	*Gazette of India*, 1889, Part I, page 299.

[1] For this and the following lists of places to which the Evidence Act extends, the Editor is indebted to the courtesy of Messrs. Harvey James and J. M. Macpherson of the Legislative Department and to the labours of the latter gentleman.

[2] The Lists referred to are Macpherson's Lists of British Enactments in force in Native States.

Names of places.	Notification or other authority.	Where published.
A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED—(*contd.*)		
NORTHERN INDIA.		
5. Manipur [*For purposes of cases in which British subjects are defendants*].	No. 418-E., dated the 3rd March 1891.	Native States Lists, Northern India, Ed. 1891, page 46.
6. Jammu and Kashmir [*For purposes of cases in which the Governor-General in Council has jurisdiction*].	No. 933-E., dated the 8th May 1891.	Ditto page 134.
7. Baluchistan Agency Territories.	Baluchistan Agency Laws Law 1890.	Baluchistan Code, Ed. 1890, page 137.
CENTRAL INDIA AND RAJPUTANA.		
8. Lands occupied by the Indian Midland Railway in the Dholpur State in the Rajputana Agency and in the States in the Central India Agency.	No. 4078-I., dated the 3rd December 1890.	Native States Lists, Rajputana, Ed. 1891, page 98.
9. Lands occupied by the Cawnpore-Achnera Section of the Rajputana-Malwa Railway in the Bhurtpore State in the Rajputana Agency.	No. 2920-I., dated the 28th August 1885.	Ditto page 101.
10. Lands occupied by the Rajputana-Malwa Railway in the Native States in the Rajputana Agency (excluding the Cawnpore-Achnera Section) and in the Native States in the Central India Agency (excluding the portion of the Railway to the south of the River Nerbudda).	No. 1329-I., dated the 30th April 1885.	Native States Lists, Rajputana, Ed. 1891, page 108.
11. Mhow Cantonment (Indore State).	No. 5022-I., dated the 24th December 1891.	*Gazette of India*, 1891, Part I, page 701.
12. Neemuch Cantonment (Gwalior State).	No. 5022-I., dated the 24th December 1891.	*Gazette of India*, 1891, Part I, page 701.
13. Nowgong Cantonment and Civil Lines (Chatarpur State, Bundelkhand).	No. 5022-I., dated the 24th December 1891.	*Gazette of India*, 1891, Part I, page 701.
WESTERN INDIA.		
14. Disah Cantonment (Pahlanpur State, Bombay) [*except the 3rd paragraph of section 1*].	No. 403-I. dated the 4th February 1885.	*Gazette of India*, 1885, Part I, page 103.

Names of places.	Notification or other authority.	Where published.
A.—PLACES TO WHICH THE ACT HAS BEEN SPECIFICALLY APPLIED—(*concld.*)		
WESTERN INDIA—(*concld.*)		
16. Kolhapur Civil Station (Kolhapur State, Bombay).	No. 4803-I., dated the 9th November 1887.	*Gazette of India*, 1887, Part I, page 583.
16. Bhuj Cantonment (Cutch State, Bombay).	No. 2840-I., dated the 9th July 1891.	*Gazette of India*, 1891, Part I, page 416.
17. Baroda Cantonment (Baroda State).	No. 1163-I., dated the 23rd March 1888.	*Gazette of India*, 1888, Part I, page 137.
B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION.		
SOUTHERN INDIA.		
1. Ramandrug (*in respect to Criminal jurisdiction over all persons not being subjects of the Raja of Sandur*).	No. 1018-I., dated the 5th March 1891.	*Gazette of India*, 1891, Part I, page 124.
2. Lands occupied by the Bangalore Branch of the Madras Railway.	No. 292-I., dated the 5th February 1888.	Native States Lists, Southern India (Madras and Mysore), Ed. 1888, page 149.
3. Lands occupied by the Mysore Section of the Southern Mahratta Railway.	No. 3713-I., dated the 19th September 1889.	*Gazette of India*, 1889, Part I, page 518.
4. Bolaram Cantonment (Hyderabad State).[3]	No. 3317-I., dated the 3rd October 1890.	*Gazette of India*, 1890, Part I, page 721.
5. Hingoli Cantonment (Hyderabad State).[3]	No 2007-I., dated the 11th May 1891.	*Gazette of India*, 1891, Part I, page 251.
6. Ráichore Cantonment (Hyderabad State).[3]	No. 3300-I., dated the 8th August 1891.	*Gazette of India*, 1891, Part I, page 475.
7. Aurangabad and Jalna Cantonments (Hyderabad State).[3]	No. 4045-I., dated the 2nd October 1891.	*Gazette of India*, 1891, Part I, page 565.
8. Mominabad Cantonment (Hyderabad State)[3]	No. 4607-I., dated the 24th November 1891.	*Gazette of India*, 1891, Part I, page 649.
9. Lands occupied by the Southern Mahratta Railway in the Hyderabad State.	No. 4564-I., dated the 18th November 1891.	*Gazette of India*, 1891, Part I, page 638.

In the case of these Cantonments, neighbouring British Courts, which are invested with jurisdiction therein, are directed to apply the same laws as they apply within the local limits of their ordinary jurisdiction.

Names of places.	Notification or other authority.	Where published.
B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(*concld.*)		
NORTHERN INDIA.		
10. Lands occupied by the Bengal-Nagpur Railway in Native States under the political control of the Government of Bengal except a portion of the Gangpur State.	No. 1033-I., dated the 28th March 1890.	Native States Lists, Northern India, Ed. 1891, page 84.
11. Lands occupied by the Bengal-Nagpur Railway in the Hingir Taluq, and in the western parts of the Gangpur State between the Sambalpur Road and Govindpur Railway Stations.	No. 3146-I., dated the 29th July 1891.	*Gazette of India*, 1891, Part I, page 445.
12. Lands occupied by the head-works of the Bhawalwah Lodran Canal (Bhawalpur State, Punjab).	No. 2894-I., dated the 25th September 1883.	Native States Lists, Northern India, Ed. 1891, page 80.
13. Kasumpti, Simla (Keonthal-Hill State).	No. 1516-I., dated the 15th May 1885.	Native States Lists, Northern India, Ed. 1891, page 84.
14. Lands occupied by the Delhi - Umballa - Kalka Railway in the Kalsia and Patiala States (Punjab).	No. 4196-I., dated the 15th October 1891.	*Gazette of India*, 1891, Part I, page 587.
15. Lands occupied by the North-Western Railway in the Nabha, Patiala and Kapurthala States (Punjab).	No. 1503-I., dated the 7th May 1886.	Native States Lists, Northern India, Ed. 1891, page 120.
16. Lands occupied by the Rajputana-Malwa Railway in the Nabha and Pataudi States (Punjab).	No. 1007-I., dated the 21st March 1884.	Native States Lists, Northern India, Ed. 1891, page 123.
17. Lands occupied by the Rewari - Ferozepur section of the Rajputana-Malwa Railway in the Nabha and Faridkot States (Punjab).	No. 2025-I., dated the 28th August 1885.	Native States Lists, Northern India, Ed. 1891, page 125.
18. Lands occupied by the Rewari - Ferozepur section of the Rajputana-Malwa Railway in the Patiala, Jhind, and Dujana States (Punjab).	No. 3027-I., dated the 5th November 1886.	Native States Lists, Northern India, Ed. 1891, Part I, page 125.

Names of places.	Notification or other authority.	Where published.
B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(*contd.*)		
NORTHERN INDIA—(*concld.*)		
Lands occupied by the Jammu and Kashmir Railway (Sialkot-Jammu section of the North-Western Railway) in the State of Jammu and Kashmir.	No. 1458-I., dated the 8th April 1891.	Native States Lists, Northern India, Ed. 1891, page 142.
CENTRAL INDIA AND RAJPUTANA.		
Meywar and Marwar-Merwara.	No. 38-J., dated the 8th March 1872.	Native States Lists, Rajputana, Ed. 1891, page 45.
Deoli Cantonment (Meywar and Jaipur States).	No. 99-J., dated the 18th June 1875.	Native States Lists, Rajputana, Ed. 1891, page 62.
Lands occupied by the Bengal-Nagpur Railway in the Feudatory States of the Central Provinces and in the Rewah State in the Central India Agency.	No. 3146-I., dated the 29th July 1891.	*Gazette of India*, 1891, Part I, page 445.
Lands occupied by the Umaria Coal Fields in the Rewah State (Central India Agency).	No. 3881-I., dated the 30th October 1885.	*Gazette of India*, 1885, Part I, page 619.
Lands occupied by the Indore section of the Rajputana-Malwa Railway to the South of the River Nerbudda.	No. 1007-I., dated the 21st March 1884.	*Gazette of India*, 1884, Part I, page 124.
WESTERN INDIA.		
Lands occupied by the Great Indian Peninsula Railway in the Kurundwar State (Bombay Presidency).	No. 118-J., dated the 14th September 1876.	*Gazette of India*, 1876, Part I, page 496.
Lands occupied by the Kolhapur State Railway in the States of Kolhapur and Miraj, Senior (Bombay Presidency).	No. 3017-I., dated the 22nd July 1891.	*Gazette of India*, 1891, Part I, page 433.
Lands occupied by the Mehsana-Viramgam Railway in the Baroda State and in the Katosan and Ijpura Estates of the Mahikantha Agency (Bombay Presidency).	No. 2554-I., dated the 18th June 1891.	*Gazette of India*, 1891, Part I, page 356.

Names of places.	Notification or other authority.	Where published.
B.—PLACES TO WHICH THE ACT HAS BEEN GENERALLY APPLIED IN COMMON WITH OTHER ENACTMENTS IN FORCE IN NEIGHBOURING BRITISH DISTRICTS OR PLACES UNDER BRITISH JURISDICTION—(*concld.*)		
WESTERN INDIA—(concld.)		
28. Lands occupied by the Southern Mahratta Railway in States in the Presidency of Bombay.	No. 4760-I., dated the 4th November 1887.	*Gazette of India*, 1887, Part I, page 568.

The following is a list of places beyond the limits of India to which the Act has been made applicable by Her Majesty in Council for purposes of cases in which Her Majesty has jurisdiction.

1. Zanzibar ..	Zanzibar Order in Council, dated the 29th November 1884, Article 8 (*b*).	*Gazette of India*, 1885, Part I, page 242.
2. Persian Coast and islands	Persian Coast and Islands Order in Council, dated the 18th December 1889 Article 7 (2).	*Gazette of India*, 1890, Part I, page 142.
3. Somali Coast of the Gulf of Aden.	Somali Order in Council, dated the 18th December 1889, Article 4.	*Gazette of India*, 1890, Part I, page 140.

The following is a list of some Native States in India which have adopted the Act as their law.[4]

1. Puddukottai (Madras Presidency).	Puddukottai Regulation II of 1882.	See note in Native States Lists, Southern India (Madras and Mysore), Ed. 1888, page 20.
2. Sandur (Madras Presidency).	Introduced by the Raja ..	Ditto.
3. Mysore	Schedule attached to the Instrument dated 1st March 1881, transferring the Government to the Maharaja.	Native States Lists, Southern India (Madras and Mysore), Ed. 1888, Appendix B, page 51.

[4] This list only contains such information as has been collected up to date and does not profess to be exhaustive.

In addition to the Native States that have adopted the Act, it may be mentioned that in the Kathiawar Agency, rules based on the Indian Evidence Act (1 of 1872) have been brought into force by Notification No. 1, dated the 5th January 1874, see *Kathiawar Agency Gazette*, 1874, Supplement, page 23.

Names of places.	Notification or other authority.	Where published.
4. Akalkot (Bombay Presidency).[5]	Notification No. 3413, dated the 19th July, 1880.	*Bombay Government Gazette* 1880, Part I, page 658.
5. Janjira (Bombay Presidency).	Notification by the Nawab of Janjira.	Not known.
6. Jath (Bombay Presidency).	Notification by the Chief of Jath, dated the 5th May, 1888.	
7. Kolhapur State (Bombay Presidency).	Notification by the Council of Administration on behalf of the Minor Raja, dated the 25th February 1888.	
8. Miraj (Junior); (Bombay Presidency).	Notification by the Joint Administrators on behalf of the Minor Chief, dated the 10th August 1888.	
9. Ramdurg (Bombay Presidency).	Ditto ditto, dated the 17th December 1888.	
10. Sachin (Bombay Presidency).	No. 2983, dated the 7th May 1887 (on behalf of the Government of the Nawab of Sachin).	*Bombay Government Gazette*, 1887, Part I, page 877.
11. Sawantwadi (Bombay Presidency).	Notification No. 540, dated the 10th March 1888, by the Political Superintendent of the State (on behalf of the Government of the Chief).	Not known.

The Act now applies only to Native Courts Martial under Act V of 1869. As regards European Courts Martial it has been provided by the Army Act, 1881 (44 & 45 Vic. cap. 58, sec. 127), that a Court Martial under that Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any Legislature whatsoever other than the Parliament of the United Kingdom. Section 128 of the same Statute enacts that the rules of evidence to be adopted in proceedings before Courts Martial shall be the same as those which are followed in Civil Courts in England, and no person shall be required to answer any question or to produce any document which he would not be required to answer or produce in similar proceedings before a Civil Court. See also, as to other matters of evidence before such Courts Martial, sections 163, 164 and 165 of the same Statute.

Act I of 1872 is (subject to such modification as the Governor-General in Council may direct) applicable to all proceedings before Indian Marine Courts—see Act XIV of 1887, section 68.

[5] The Act was introduced by the Governor of Bombay in Council when the State was under British management.

having been made in conformity with the provisions of the said Acts, or of any other Act of Parliament respecting the constitution and powers of the Council of *India* or of the Governor-General, or respecting the powers of such Governors or Governors in Council, or Lieutenant-Governors as aforesaid." This section has been interpreted as prohibiting thereafter the making of rules, &c., for the Non-Regulation Provinces otherwise than at meetings of the Councils for framing laws and regulations; and in consequence none such have been made since 1861. For the legislative powers which may now be exercised by the above-named authorities otherwise than at such meetings, see the 33rd Vic. cap. 3, and the *Introduction* to the Author's *Chronological Table of and Index to the Indian Statute-Book*, page 18.

The proviso is important. There are several provisions of Statutes of the British Parliament and of Acts of the Indian Legislature* which relate to the subject of evidence, and which are in force in India. Such of these as are important will be found in their proper places in the notes that follow. It may be well to remember that the "Evidence Act" does not contain the whole of the law of evidence as enacted by the Legislature; but at the same time there are no other rules of evidence now in force in India, except such as are contained in this Act or in some other Statute, Act or Regulation in force in British India.

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

'Court.'

'Court' includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

The Bombay High Court has held that a Magistrate holding a preliminary enquiry under section 164 of the Criminal Procedure Code in a Police investigation does not exercise the functions of a Court, and therefore a statement made before him in the course of such an investigation cannot form the basis of an alternative charge for giving false evidence:—*Queen-Empress* v. *Bharma* (I. L. R. 11 Bom. 702).

In *Empress* v. *Asutosh Chakravartti* (I. L. R. 4 Calc. 483) the Calcutta High Court has said that in section 30 of the Evidence Act the word "Court" in a trial by a Judge with a Jury includes both Judge and Jury.

In the case of *Sarakari Lal*, 22 W. R. Cr. 10; 13 B. L. R. App. 40, it was ruled that a Sub-Registrar is a Court within the meaning of section 3 of the Evidence Act, and, therefore, when an act amounting to a contempt of Court under section 228, P. C., is committed before him, he must proceed

* For a complete list of these Statutes and Acts, see Whitley Stokes's Anglo-Indian Codes, Vol. II, pp. 822–827.

either under section 435 or 436 of the old Criminal Procedure Code, X of 1872, (sections 480 and 482, Act X of 1882). This case seems to have led to the enactment of section 84 of Act III of 1877, which lays down that while every registering officer is a public servant, and the words "judicial proceeding" in section 228, P. C., shall include any proceeding under the Registration Act, a Registrar is, but a Sub-Registrar is not, a Court within the meaning of sections 435 and 436 of the Code of Criminal Procedure. Hence, a Registrar can now himself punish for a contempt committed before him; and if he does not do so, the prosecution for such an offence must be commenced by a proceeding under section 482. A Sub-Registrar has no such powers; but there is no such restriction in respect of a prosecution for an offence under section 228 committed before him.

Section 483 of the present Criminal Procedure Code, however, prescribes that when the Local Government so directs, any Registrar, or any Sub-Registrar appointed under the Indian Registration Act, 1877, shall be deemed to be a Civil Court within the meaning of sections 480 and 482. This section seems superfluous so far as the Registrar is concerned.

The rulings as to whether a registering officer is a Court or not, within the meaning of section 195, Code of Criminal Procedure, so as to make his sanction a condition precedent to a prosecution for an offence alleged to have been committed before him, are conflicting. The Bombay High Court in *Queen-Empress* v. *Tulja*, I. L. R. 12 Bom. 36, has held that a Sub-Registrar under the Registration Act, III of 1877, is not a Judge and, therefore, not a Court within the meaning of section 195 of the Code of Criminal Procedure. His sanction is, therefore, not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office. The definition of Court given in the Evidence Act, it was said, is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope. The Madras High Court at first, in *In re Venkatachala Pillai*, I. L. R. 10 Mad. 154, held that a Sub-Registrar acting under section 41 of the Registration Act, 1877, is a "Court" within the meaning of section 195 of the Criminal Procedure Code. Subsequently, in *Queen-Empress* v. *Subba*, I. L. R. 11 Mad. 3, it held that a Sub-Registrar acting under section 34 of the Registration Act, 1877, is not a Court within the meaning of section 195 of the Code of Criminal Procedure. But in a recent case, *Atchayya* v. *Gangayya*, I. L. R. 15 Mad. 138, which is a Full Bench decision, it ruled that a Registrar while acting under sections 72—75 of the Registration Act, is a Court for the purposes of section 195, Criminal Procedure Code.

The Calcutta High Court has not yet expressly decided the point. In the Full Bench case of *Gopinath* v. *Kuldip Singh*, I. L. R. 11 Calc. 566, in which, overruling *Queen* v. *Batesar Mandal*, I. L. R. 10 Calc. 604, it held that the sanction of a registration officer is not necessary before instituting a prosecution under section 82 of the Registration Act, it was said that it was not necessary for the purposes of the case to consider whether in holding an enquiry under the Registration Act the Registrar is acting as a Court within the meaning of section 195 of the Criminal Procedure

Code. The rule thus laid down was followed by the Madras High Court in *Queen-Empress* v. *Vythilinga*, I. L. R. 11 Mad. 500. Its recent Full Bench decision in *Atchayya* v. *Gangayya* does not deal with this point.

In *Krishna Nath Kundu* v. *Brown*, I. L. R. 14 Calc. 176, a registered power-of-attorney was admitted in evidence without proof on the ground that the registering officer was a Court within the meaning of section 3 of the Evidence Act. But this case has been dissented from in *Salimatul Fatima* v. *Kailashpati Narain Singh*, I. L. R. 17 Calc. 903, in which it was pointed out that mere registration of a document is not in itself sufficient evidence of its execution.

'Fact.' 'Fact' means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b*) That a man heard or saw something, is a fact.

(*c*) That a man said certain words, is a fact.

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e*) That a man has a certain reputation, is a fact.

'Relevant.' One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

Chapter II, sections 5 to 55, treats of the Relevancy of Facts.

'Facts in issue.' The expression 'facts in issue' means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any

Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

The law at present in force will be found in Chapter XI, sections 146—151, of Act XIV of 1882.

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death ;

That A intended to cause B's death ;

That A had received grave and sudden provocation from B ;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

'Document.'

'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

This definition is the same as that contained in section 29 of the Indian Penal Code, with the exception of the *last seven words*, which have been substituted for "as evidence of that matter."

Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

'Evidence.'

'Evidence' means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ;

such statements are called oral evidence :

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

The Bill as originally drafted contained a third subdivision included in the definition of 'Evidence,' namely—

"(3) All material things other than documents produced for the inspection of the Court ;

Such things are called material evidence."

An example of such *material* evidence is the weapon or other article of property, which section 218 of the Code of Criminal Procedure requires, to be transmitted to the Court of Session, or, when the commitment is made to the High Court, to the Clerk of the Crown, when an accused person is committed for trial by either of these Courts. The *Select Committee* stated in their *Second Report* that they had resolved to omit the above provisions relating to material evidence; but they mentioned no reason for this determination. It is to be observed, however, that a Judge can see such things for himself with his own eyes, and the knowledge derivable therefrom is obtained without the use of any *medium*. Witnesses, who have become acquainted with a fact by the use of their own senses, are the *medium* whereby knowledge of that fact is communicated to the Court. A document is the *medium* whereby knowledge of the matters expressed or described therein is conveyed to the Court; but when a blood-stained weapon or a broken box is presented to the Judge's view, all the knowledge derivable therefrom is obtained, without the use of any *medium*, directly by his own senses. Another kind of material evidence, to which the same remarks apply, is the *inspection of the locality* by the Court. The 58th section of the Common Law Procedure Act, 1854, provided for the inspection by the Court or a Judge of *any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.* The Indian Code of Civil Procedure contains no provision exactly similar; but section 392 of this Code contemplates a local investigation conducted by the Judge in person; and Munsiffs and other Judges of Civil Courts in the Mufassil occasionally visit and inspect the locality; when they see occasion to do so.—See *Wise* v. *Amirunnissa Khatun*, 3 W. R. 129; and *Joi Kumar* v. *Bandhu Lal*, I. L. R. 9 Calc. 363 : 12 C. L. R. 490. Section 293 of the Code of Criminal Procedure provides for a view by the Jury or Assessors of *the place in which any offence charged is said to have been committed, or any other place in which any other transaction material to the inquiry in the trial took place.*

'Proved.'

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

'Disproved.'

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man

ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

'Not proved.'

A fact is said not to be proved when it is neither proved nor disproved.

See the remarks as to Belief, Disbelief, &c., page 71 of the *Introduction*.

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

'May presume.'

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

'Shall presume.'

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

'Conclusive proof.'

As to *Presumptions*, see sections 79 to 90 and 114, *post*.

The cases where the Court *may* (and *does*) presume, and *shall* presume, correspond to the *disputable* or *rebuttable* presumptions, of other systems of evidence. The last paragraph of the section relating to "conclusive proof" includes what are called in the same systems *conclusive* or *imperative*, or *absolute* or *irrebuttable* presumptions.

This Chapter, as originally drafted, contained the following section:—

"Courts shall form their opinions on matters of fact by drawing inferences—

(1) from the evidence produced to the existence of the facts alleged;

(2) from facts proved or disproved to facts not proved;

(3) from the absence of witnesses who, or of evidence which, might have been produced;

(4) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the case."

The *Select Committee* decided to omit this section "'as being suitable rather for a treatise than an Act.' The object of its introduction was originally stated to be *to point out and put distinctly upon record the fact that to infer and not merely to accept or register evidence is in all cases the duty of the Court.*"

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

For the definition of "Facts in issue," see *ante*, section 3, page 86.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceeding, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

The production of documents is regulated by sections 59—63, 138, 139, and 568 of the Code of Civil Procedure, Act XIV of 1882.

It is the duty of the Court not to admit evidence of irrelevant facts: cf. sections 60, 64, and proviso 2, section 165 of this Act, section 140, para. 2, of the Code of Civil Procedure, and section 298 of the Code of Criminal Procedure. See also note to section 165, *post*.

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

[See *in the matter of the petition of Surat Dholni*, I. L. R. 10 Calc. 302.]

(*b*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Facts which are the occasion, cause or effect of facts in issue.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation, and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

[*R.* v. *Edmunds*, 6 C. & P. 164; *Neile* v. *Jakle*, 2 C. & K. 709.]

Illustrations.

(*a*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b*) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c*) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d*) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that

he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B'—and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B Rs. 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B Rs. 10,000'—and that A went away without making any answer, are relevant facts.

[See *in the matter of the petition of Surat Dhobni*, I. L. R., 10 Calc. 302.]

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter, warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157.

It was at one time thought necessary in England, and it seems to be still necessary in America, that, to be relevant, conduct should be *contemporaneous*. Of late years, however, this doctrine has been rejected in England; and the rule now is, that, although concurrence of time must always be considered as material to show the connection, it is by no means essential. Concurrence of time may, however, be important in estimating the *weight* to be given to the evidence when admitted.

In order to ascertain the real intention of parties to an instrument, evidence of what they have done under it since its execution is relevant. "It may be laid down as a general proposition," says Mr. Taylor, "that all ancient instruments of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or, in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed"—§ 1091: § 1205, 8th edn. In the case of the *Attorney-General* v. *Drummond*,[7] Lord Chancellor Sugden said:—"Tell me what you have done under such a deed, and I will tell you what that deed means." This application of the general maxim—*optimus interpres rerum usus*—has been somewhat extended of late years, at least in India, and can now scarcely be said to be restricted to ancient documents, *i.e.*, documents at least thirty years old. In *Watson & Co.* v. *Mohesh Narain Rai*, 24 W. R. 176, the *patta* was less than twenty years old at the time of the institution of the suit; and their Lordships of the Privy Council expressed an opinion that the real intention of the parties was to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by *the conduct of the parties since its execution*. For other instances of the application of the principle, see *Nidhi Krishna Basu* v. *Nistarini Dasi*, 13 B. L. R. 420: 21 W. R. 386: *Chitan Lal* v. *Chattardhari Lal*, 19 W. R. 432: *Girdhar Naggishet* v. *Ganpat Maroba*, 11 Bom. H.C. Rep. 129.

Under English law the statements referred to in Explanation 2 are admissible on the ground that they are part of the *res gestæ*.

In *Doe* v. *Tatham* (4 Bing. N. C. 548) Baron Parke said:—"Where any facts are proper evidence upon an issue, all oral or written declarations, which can explain such facts, may be received in evidence."

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[7] 1 Dru. & War. 368.

In *Empress* v. *Rama Birapa*, I. L. R. 3 Bom. 17, West, J., points out that the Evidence Act intends to make only these statements admissible, "which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial."

As regards the statements made by an accused person accompanying and explaining his acts, this section must be read in connection with sections 25 and 26. It is not intended to admit statements as part of the evidence, which would be shut out by these sections.—*Queen-Empress* v. *Nana*, I. L. R. 14 Bom. 260.

As to statements which are relevant under other sections of the Act, see sections 32—39, *post*.

The case of *Queen-Empress* v. *Abdullah*, I. L. R. 7 All. 385, should be studied in connection with Explanation 2. In this case the accused was charged with murder, and it appeared that the deceased shortly before his death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge to prove the questions put to the deceased and the signs made by her in answer to such questions. Mahmud, J., was of opinion that the word "conduct," as used in section 8, does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact, that the signs made by the deceased were the conduct of a "person an offence against whom was the subject of any proceeding," and were relevant as such under section 8, and that the questions put to her were admissible in evidence either under Explanation 2 of the same section or under section 9 by way of explanation of the meaning of the signs. Petheram, C. J., was of a contrary opinion, and held that the conduct made relevant by section 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. The ruling of the Court, which was a Full Bench, was that the questions and signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death, within the meaning of section 32 of the Evidence Act, and were therefore admissible under that section.

The last two illustrations to this section are important. Under English law it was decided that the *particulars* of the complaint may not be disclosed by the witnesses for the prosecution either as original or as confirmatory evidence (*R.* v. *Walker*, 2 M. & R. 212), but that the details of the statement can only be elicited by the prisoner's counsel on cross-examination. Of late years, however, some Judges have followed a different practice. "It is difficult," says Mr. Taylor, "to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because, if witnesses were permitted to relate all that the prosecutrix had said in

making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial"—§ 519 : § 581, 8th edn. Under the above illustrations, *the terms* of the complaint are admissible as original evidence.—See *Queen* v. *Macdonald*, 10 B. L. R. App. 2.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b*) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(*c*) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

[Declarations made or letters written during absence from home, explanatory of the motive of departure, are admissible as original evidence, since

the departure and absence are very properly regarded as one continuing act. —Tay. § 526, § 529, 8th edn.]

(*d*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

[*Hadley* v. *Carter*, 8 New Hamps. R. 40; *Brukowsky* v. *Thacker, Spink and others*, 6 B. L. R. 107.]

(*e*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the trasnaction.

[Lord George Gordon's Case, 21 How. State Trials, 514, 529.]

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(*a*) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the

conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

In connection with the above section the following points should be clearly understood: *1st*,—The section applies to the case either of an *offence* or of an *actionable wrong*, to joint conspirators and to co-trespassers or other *tort feasors*. *2nd*,—Before the evidence is admitted there must be *reasonable ground* to believe in the existence of a conspiracy. In England it has been occasionally allowed, for the sake of convenience, to give the acts or declarations of one conspirator in evidence before sufficient proof has been given of the conspiracy itself, the prosecutor undertaking to furnish such proof at a later stage of the case. *3rd*,—The connection of the individuals in the unlawful enterprise being shown, every act and declaration of each member of the confederacy is original evidence against every other member, although ignorant of them, and although the persons doing these acts or making these declarations may have been strangers to him. *4th*,—These acts and declarations are admissible as evidence though made *before or after* the connection with the enterprise of the individual against whom they are used. *5th*,—A letter, giving an account of the conspiracy is admissible, apparently, even though *not written in support of it or in furtherance of it*. This last rule is contrary to that followed in England. See the whole principle discussed—Tay. §§ 526—534, §§ 589—597, 8th edn. Best § 508. See also *Queen* v. *Amiruddin*, 7 B. L. R. 63 : 15 W. R. Cr. 25 and *Queen v. Amir Khan*, 9 B. L. R. 36 : 17 W. R. Cr. 15.

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore, is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

An instance of a fact being relevant as being inconsistent with a relevant fact is to be found in the case of *Reg.* v. *Sakharam Mukundji* (11 Bom. 166), in which the statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, when the latter stated he was and saw the accused persons, was held to be properly admissible in evidence. According to the Full Bench decision of *Gaju Lal* v. *Fateh Lal*, I. L. R. 6 Calc. 171: 6 C. L. R. 439, a judgment not being a judgment *in rem* nor one relating to matters of a public nature, nor one between the same parties or those claiming under them, is not admissible in evidence as a relevant fact under section 11. See also *Ranchhoddas Krishna Das* v. *Bapu Narhar*, I. L. R. 10 Bom. 439; *The Collector of Gorakhpur* v. *Pataldhari Singh*, I. L. R. 12 All. 1, and the note to section 13. But in a suit against several defendants, in which there was a question as to whether a certain lane was common property or not, it was held that an admission as to the common ownership of the lane, made by one of the defendants in a previous suit to which the other defendants were not parties, and a similar statement by still another defendant in a deed, were admissible in evidence under the principle laid down in section 11.—*Narovinayak Patvardhan* v. *Narhari Bin Raghunath*, I. L. R. 16 Bom. 125.

In suits for damages, facts tending to enable Court to determine amount, are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

As to character affecting damages, see section 55, *post*.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant:—

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(*b*) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcileable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Whether decrees in previous suits not *inter partes* are admissible in evidence.

There has been some difference of opinion as to the meaning of the words "right and custom" in this section, and as to their consequent effect. In *Surjo Narain Panda* v. *Bissambhar Singh*, 23 W. R. 311, it was pointed out that the right mentioned in the action was not a public right only; for, the right referred to in the illustration is a private one. That being so, it has been a subject of much contention, whether previous judgments and decrees, not being between the same parties, are admissible in evidence in proof of such rights. At first, it was held without dispute that they were so admissible.

Thus, in *Niyamat Ali* v. *Gúrú Das*, 22 W. R. 365, the plaintiff asserted an *itmámi* tenure in certain lands; and, in support of his case, tendered certain copies of judgments in suits to which a former holder of the superior tenure belonging to the person who was said to have created the *itmámi* right claimed by the plaintiffs, was a party. These judgments went to prove the existence of the *itmámi* right, but were rejected by the lower Court on the ground that the defendant was no party to the suits in which they were made. The High Court held, that they were relevant under the above section. Couch, C. J., after remarking that they were not relevant under sections 40, 41, or 42, proceeded thus :—"But there are words in section 43, which introduce another section of the Act. They are—'unless the existence of the judgment is relevant under some other provision of the Act.' And if judgments of the description of those produced by the plaintiff are evidence at all (and we cannot think that it was intended that they should not be), they must be admissible or relevant by section 13, which says, &c. Here the right, the existence of which was in question, was the right of the plaintiff to the *itmámi* lease; and in the suits, in which the decrees were made, this right was claimed and asserted successfully. The word 'transaction' is certainly large enough to allow the proceedings in such suits as these to be admitted as evidence, not as conclusive, but as of such weight as the Court may think they ought to have. And in this section there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. Of course the value of it will be very different where it was given in a suit to which the person against whom it is used was not a party and had no opportunity of contesting the matter, and where he was a party to the suit and had the opportunity of producing any evidence he might think fit. Unless the Indian Evidence Act has excluded judgments and decrees which had previously

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been always considered as very good evidence, and which are indeed in many cases almost, if not quite, conclusive, it is clear that the decisions referred to were admissible in this case." See also *Gati Kaibarto* v. *Bhakat Kaibarto*, 22 W. R. 457, and the observations of Westropp, C. J., in *Naranji Bhikabhai* v. *Dipá Uma d* (I. L. R. 3 Bom. 5), in which case, however, the decree and judgments given in evidence were either between the same parties as those in that suit or between those under whom they respectively claimed. In the following cases the same principle was followed, and previous judgments and proceedings in suits were admitted as *transactions* relevant within the meaning of the above section :—*Kundu Nath Sarma Gosámi* v. *Dhir Chandra Sarma Adhikari Gosámi*, 20 W. R. 345 : *Rup Chand Bhakat* v. *Har Kishan Das*, 23 W. R. 162 (Judgment in accordance with and setting out the terms of a compromise) : *Mohesh Chandra Brahmachari* v. *Dinú Bandhu Basu*, 24 W. R. 265 (A judgment, which had been reversed on a technical point and not on the merits, held admissible for what it was worth) : *Lachmidhar Pattak* v. *Raghúbar Singh*, 24 W. R. 284 (Proceedings in a case in which certain decree-holders sought to attach the *mukarrari* rights of an ancestor of the defendants) : *Húnsa Koer* v. *Sheo Gobind Raut*, 24 W. R. 431 (An *ex-parte* decree admitted) : *Omer Dutt Jah* v. *Burn*, 24 W. R. 470 : *Dattari Mahanti* v. *Jago Bandhu Mahanti*, 23 W. R. 293 (Road cess papers and a deed of sale held to be transactions and instances within the meaning of the above section, in which the rights of the plaintiffs and their predecessors had been asserted and recognised.)

In *Rameshar Persad Narain Singh* v. *Kunja Bihari Pattak* (L. R. 6 I. A. 33, 41 : I. L. R. 4 Calc. 633, the question was between the proprietors of two estates, A and B, as to the right to the flow of water from an artificial reservoir through an artificial water-course on estate B, belonging to the defendant. In 1831, proceedings had been taken in the Criminal Court by the owners of estate A against some tenants of estate B who had closed the water-course. These proceedings were terminated by a *razinama* or document of compromise which was used in evidence in the case before the Privy Council. Their Lordships said :—"It was objected that this *razinama* does not bind the proprietors of B; but, although it was apparently made between tenants, it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water." Their Lordships also referred to a decision of a Magistrate in a case between the parties under section 320 of the Code of Criminal Procedure (of 1861—section 147 of the Code of 1882), observing that the proprietors of B did not seem to have challenged this decision of the Magistrate in the Civil Court.

But in *Gajju Lal* v. *Fatteh Lal* (decided by a Full Bench of the Calcutta High Court, I. L. R. 6 Calc. 171 : 6 C. L. R. 439) the Court came to a different conclusion. In this case A sued B to recover possession of certain property. It was admitted that A would be entitled to this property, as heir of one X, if one C had survived Y : but that, if C had predeceased Y, A would not be so entitled. The plaintiff A, offered in evidence

a judgment in a previous suit between B as plaintiff and certain third parties as defendants, in which, the question being whether B or C was the heir of X, it was decided that C was the nearest heir. B contended that A, not having been a party to the first suit, was not entitled to use the judgment in that suit as evidence in his own favour and against him (B) in the second suit. Four out of five Judges held that the judgment was not admissible in evidence. Three of these four Judges were of opinion that the judgment was not a fact within the meaning of section 11, nor a 'transaction' within the meaning of section 13 of the Evidence Act. It was observed that if a judgment were admissible under either of these sections, as a *fact* or as a *transaction*, the special provisions of sections 40, 41 and 42 of the Act would be unnecessary. Garth, C. J., and Jackson, J., were further of opinion that the word 'right' should be construed to mean 'incorporeal right,' and that this appeared as well from its being used in conjunction with 'custom' as from the other language of the context.

In a subsequent case, *Hira Lal Pal* v. *Hills* (11 C. L. R. 528), however decrees for rent were admitted to show that certain land alleged to be *lakhiraj* or rent-free was rent-paying land,—that is, they were used to show the character of the land.

Similarly, in *Piari Mohan Mukharji* v. *Drabomai Debi*, I. L. R. 11 Calc. 745, which was a suit for the possession of land, the defendants, in order to show the character of their possession, offered in evidence a judgment obtained by them in a suit to which the plaintiff or his predecessors in title were not parties, and it was held on the authority of *Davies* v. *Lowndes*, 1 Bing. N. C. 636 and *Rameshar Prasad Narain Singh* v. *Kunjo Bihari Pattak*, L. R. 6 I. A. 33, the Privy Council decision already cited, that the judgment was admissible in evidence, to show the nature of the enjoyment which the defendants then had in the land. Another case to the same effect is *Jianatulla Sirdar* v. *Ramani Kant Rai*, I. L. R. 15 Calc. 233, which was a suit in which the amount of the rent of certain land was in question. The plaintiff contended that the amount of the rent was to be computed after the measurement of the land by a cubit of 18 inches, while the defendant maintained that the cubit prevalent in the pargana was one of 21 odd inches. In this suit the plaintiff tendered in evidence twenty-one decrees which he had obtained against other tenants of the same pargana in which 18 inches had been taken to be the customary cubit, and it was held that these decrees were admissible in evidence as furnishing evidence of "particular instances in which a custom was claimed."

On the other hand, in *Ram Narain Rai* v. *Ram Kumar Chandra Poddar*, I. L. R. 11 Calc. 562, in which the plaintiff wished to show that he was entitled to recover rent in kind, and for this purpose tendered in evidence two *ex parte* decrees for rent in kind obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, it was held that those decrees were not admissible in evidence. It appeared in this case that the defendant was the owner of the tenure at the time the two decrees were passed, having acquired the tenur

by foreclosure, although he had not registered the transfer in the plaintiff's books, and that he was not made a party to the suits in which the decrees were passed. Hence, as he was not a party to the decrees, and did not derive his title from the parties against whom these decrees were passed, it was said they could not be evidence against him. In *Mahendro Lal Khan* v. *Rasomai Dasi*, I. L. R. 12 Calc. 207, another decree was held inadmissible for similar reasons. This was a suit for possession of land upon the allegation that the defendant refused to give up possession or pay rent for it, and the plaintiff tendered in evidence a decree declaring that the land in suit was liable for rent. This decree, however, had been obtained against the defendant by an auction purchaser, but the plaintiff did not claim title through the auction purchaser, but, on the contrary, had treated him as a trespasser and had ejected him. It was, therefore, held that he could not use against the defendants the decree in question. Finally, by a recent Full Bench decision of the Calcutta High Court,—*Surendro Nath Pal Chaudhri* v. *Braja Nath Pal Chaudhri*, I. L. R. 13 Calc. 352, the ruling in the case of *Gaju Lal* v. *Fateh Lal* was affirmed. In this suit the plaintiffs sued for their share of the rent of certain tenures which they alleged were held by the defendants who were their co-sharers in the estate. The defendants denied that they were in possession of those tenures. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent. It was held in this case, on the authority of *Gajju Lal* v. *Fateh Lal*, that the decree in the former suit was not admissible in evidence in the present suit.

The Bombay High Court, has in a recent case followed the principle laid down in *Gajju Lal* v. *Fateh Lal*. In this case, *Ranchhoddas Krishna Das* v. *Bapu Narhar*, I. L. R. 10 Bom. 439, the plaintiffs sued to recover arrears of rent for a certain shop, alleging that the annual rent was Rs. 250. The defendant contended that it was only Rs. 60. The plaintiff relied upon the evidence of his brother, who was a partner of the defendant, and on two entries in the firm's books in the handwriting of his brother. In support of the *bonâ fides* of those entries, he tendered in evidence a judgment in a previous suit between the defendant and his brother, in which the former complained that the partnership had been improperly debited by the latter with Rs. 250, and the Court decided against the present defendant. It was held that upon a proper construction of the Evidence Act, the judgment in question was not admissible in evidence against the defendant. The judgment in this case was delivered by Sargent, C. J., who said: "The words 'rights and customs' in section 13 must, we think, be understood as comprehending all rights and customs recognised by law, and therefore as including a right of ownership. As to the term 'transaction,' it is doubtless one of large import, and might, although by a somewhat strained use of it, be held to be applicable to proceedings in a suit; but as the

result of holding it to be so applicable in section 13 would be to effect a most important departure from the English rule of evidence, which would make judgments, decrees, and verdicts of juries only admissible in matters of public interest, it may well be doubted whether such was the intention of the framer of the Code."

The Madras High Court, too, has in *Subramanyan* v. *Paramaswaran*, I. L. R. 11 Mad. 123, and *Ramasami* v. *Appavu*, I. L. R. 12 Mad. 9, given in its general adhesion to the principle laid down in *Gajju Lal* v. *Fateh Lal*. "We concur," it was said in the latter of these cases, "with the learned Judges who decided *Gajju Lal* v. *Fateh Lal* that a judgment of the character there under consideration, *viz.*, as to whether a certain person was not heir to another, is neither a transaction nor a fact in the sense in which the words are used in section 13 of the Evidence Act, and that the judgment referred to in that case could not be given in evidence." They however, then proceeded to distinguish the case then under consideration from *Gajju Lal* v. *Fateh Lal*. In *Ramasami* v. *Appavu*, the plaintiffs, the trustees of a temple, sued the owners of certain lands for money alleged to be due to the temple under an alleged right, and they sought to use in evidence judgments in other suits against other persons in which this right had been recognised. The Court held that such judgments were admissible in evidence of the right, being one of the character dealt with under section 13 of the Evidence Act. In a very recent case, *Venketasami* v. *Venkatreddi*, I. L. R. 15 Mad. 12, in which the plaintiff sued to establish his title to certain land, he put in evidence a judgment obtained by his father, in which his title was recognised, neither the defendants nor their predecessors being parties to the suit in which it was delivered. It was held that the judgment was not conclusive, but was relevant evidence as tending to show that the plaintiff's ancestors had dealt with the land as their own for a long term of years. See also *Vythilinga* v. *Venkatachala*, I. L. R. 16 Mad. 194.

The Allahabad High Court has recently considered the whole subject in the Full Bench decision of *The Collector of Gorakhpur* v. *Palakdhari Singh*, I. L. R. 12 All. 1. In this case the plaintiff, Palakdhari Singh, had sued a Hindu widow to establish his right of inheritance in certain villages which had belonged to the widow's husband, to have it declared that he had died childless and that she had falsely put forward a child of unknown parentage as her husband's son. The widow was the only defendant in the suit, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After the widow's death the plaintiff, Palakdhari Singh, brought a suit against one Dalip Narain Singh, whom the Collector, as manager of the Court of Wards, had accepted as the minor son of the defendant in the first suit, and against the Collector as such manager, for possession of the same villages upon the same grounds as those put forward in the former suit. It was held by the majority of the Court that the judgments in the previous suit, though not operating as *res judicata*, were admissible in evidence, the *ratio decidendi* being that the

judgments were not facts under section 11, nor transactions under Act 13, but the record of the former suit, and not the judgments alone, was admissible under section 13 (*b*) as evidence of a particular instance in which the alleged right of the plaintiff to the property in suit had been claimed and disputed. The word "right" in both clauses (*a*) and (*b*) of section 13, it was said, included a right of ownership, and was not confined, as held by the majority in *Gaju Lal* v. *Fateh Lal*, to incorporeal rights. But the reasons given in the judgments in the former suit could not be considered in the latter suit.

A map prepared by an officer in charge of a *khasmahal*, the Government being in possession of that mahal merely as proprietor, is admissible in evidence as evidence of possession, or of an assertion of a right under section 13 of the Evidence Act.—*Janmajai Mallik* v. *Dwarkanath Mahanti*, I. L. R. Calc. 287: 4 C. L. R. 574.

Judgments not *inter parties* admissible to show existence of customs of a public nature.

Under English law, verdicts, judgments, and other adjudications, although *inter alios*, have always been receivable in evidence to show the existence or non-existence of *customs of a public nature*. The admissibility of similar evidence in India for a similar purpose was recognised before the passing of the Evidence Act. In the case of *Madhab Chandra Biswas* v. *Tomi Bewah* (7 W. R. 210), the Calcutta High Court observed as follows:—"Two instances were produced—one in the year 1852, and the other in the year 1862—in which the *right* was asserted and admitted to exist. These (judicial) proceedings are *good evidence in a matter of public interest*, such as the existence of a custom of this nature, and such a case forms a well-known exception to the usual rule which excludes *res inter alios actæ* (see Taylor on Evidence, para. 1190); and, had a large number of such instances been produced, there is no doubt whatever that the Judge would have been justified in his finding." The same principle was followed by the Madras High Court in *Nallaithambi Battar* v. *Nellakumara Pillai* (7 Mad. H. C. Rep. 307), one Judge doubting whether the judgment sought to be used as evidence was upon a matter of such general interest as to make it good evidence against a stranger. There are also some English cases, which are similar to the case given in the illustration to this section. Thus, in one case, the Crown claimed the salmon fishing above the falls in a certain river against A and others. A successfully asserted his right to this fishing, giving evidence *inter alia*, (1) of occasionally fishing there, (2) of having watchers during the spawning season, and (3) of binding his tenants in their leases to protect the fishing, and prevent all others from fishing—(*The Lord Advocate* v. *Lord Lovat*, L. R. 5 App. Cas. 273). A tenant of a Corporation brought an action against a certain person for entering his several fishery in a public navigable river, and in order to prove the ancient possession of the fishery gave in evidence an "Assembly Book" of the Corporation, which contained entries showing that the fishery was let for certain rents to a tenant. It was held that this book was admissible, for the rule is that ancient documents, coming out of the proper custody, and purporting upon the face of them to exercise ownership, such

as a lease or a license, may be given in evidence without evidence of possession or payment of rent under them, as being in themselves acts of ownership and evidence of possession (*Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593). In the same case, in order to prove the limits of the several fishery, there were tendered in evidence a bill and an answer in Chancery in a suit instituted a great many years before by another grantee of the Crown against the Corporation, and in which the limits of the alleged fishery were described. It was held that they were admissible as part of the history of the fishery and of the claims made to it (see also *Rogers* v. *Allen*, 1 Camp. 309; *Neill* v. *Duke of Devonshire*, L. R. 8 App. Cas. 135; and *Ramasami* v. *Appasu*, I. L. R. 12 Mad. 9).

Custom.

The customs referred to in this section, like the rights with which it deals, include customs of a private or local character. Section 42 deals with matters, that is, apparently, rights and customs, only of a public nature. But it would appear to be convenient to notice here the rulings as to custom in general, its essential elements, and the kind of evidence that must be given to prove it.

Essential elements of custom.

Custom is an unwritten law established by long usage and the consent of our ancestors. If it be universal, it is a part of the common law of the land; if particular, it is then properly a custom. In order to make a particular custom good under English law there are several essentials:—(*First*) it must have been used so long that the memory of man runneth not to the contrary. The time of legal memory in England was, by the Statute Westminster the First, 3 Edw. I. (A. D. 1276), limited to the reign of Richard I (July 6, 1189). If, however, the existence of a custom at a distant time be shown, and there is no evidence that at any certain time it did not exist, it may be inferred that it went back as far as the reign of Richard the First (*Leuckhart* v. *Cooper*, 7 C. and P. 119). (*Second*) it must have been continued, and (*third*) peaceable. (*Fourth*) it must be reasonable, and (*fifth*) certain. It will be void if it be unreasonable, or uncertain, or savour too much of arbitrary power (*Wilkes* v. *Broadbent*, 1 Wils. 63). In *Raja Vurma Valla* v. *Rani Vurmah Mutha* (L. R. 4 I. A. 85; I. L. R. 1 Mad. 235) their Lordships of the Privy Council said, that if the custom set up was one to sanction not merely the transfer of a trusteeship, but, as in this case, the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law. (*Sixth*) it must be compulsory, and not left to the option of every person, whether he will use it or not. (*Seventh*) it must be consistent with other customs, for one custom cannot be set up in opposition to another. Whether all these requisites are necessary to make a good custom in India, has not, I believe, been decided; but there are many cases in which *reasonableness* and *certainty* have been insisted upon.

Thus, in *Har Prasad* v. *Sheo Dyal*, 26 W. R. 55, L. R. 3 I. A. 285; their Lordships of the Privy Council have said that "a custom is a rule

which in a particular family or district has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law must be construed strictly. In *Lachman Rai* v. *Akbar Khan*, I. L. R. 1 All. 440, Turner J., said that a custom to be good must be definite; and in another case, *Lala* v. *Hira Singh*, I. L. R. 2 All. 49, it was observed that "amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character." There are rulings of the Calcutta High Court to the same effect. Thus, in *Jainab Khatun* v. *Pagal Ram*, 1 W. R. 250, it was said: "the plaintiff relies upon a custom, and unless he can show that the custom is undoubted and invariable, he is not entitled to a decree." In *Beni Madhab Banarji* v. *Jai Krishna Mukharji*, 7 B. L. R. 152, Glover, J., said that "a custom must be proved by strict evidence that what is sought to be established has existed unaltered and uninterrupted from time immemorial." In the same judgment, Glover, J., alluding to the case of *Chandra Kumar Rai* v. *Piari Lal Banarji*, 6 W. R. 190, in which it was said that a custom as to the transferableness of *khudkasht jotes* need not be absolutely invariable, observed that he doubted the correctness of that decision. In *Lachmipat Singh* v. *Sadatulla Nashyo*, I. L. R. 9 Calc. 693: 12 C. L. R. 382, the plaintiff sued to restrain certain persons from fishing in some *bhils* which belonged to his *zamindari*. They pleaded that they, in common with other inhabitants of the villages in the *zamindari*, had acquired a prescriptive right to fish in the *bhils*. It was held that the custom set up was bad for unreasonableness. There was no limitation to the number of persons entitled to enjoy it, and the tenantry might increase to any number, so that an unlimited number of persons might take away the profits of a private property and nothing be left for the owner. For other instances of custom and usage being held to be unreasonable, see *Ransordas Bhogilal* v. *Keerising Mohanlal*, 1 Bom. H. C. Rep. 229; *Arlapa Naik* v. *Narsi Keshavji and Co.*, 8 Bom. H. C. Rep. A. C. 19; *DeSouza* v. *Pestanji Dhanjibhai*, I. L. R. 8 Bom. 408.

When the dancing girls of a temple claimed to have by custom a veto upon the introduction of any new dancing girls into the service of the temple, the Madras High Court refused to recognise such a custom as being immoral, since it depended upon the association of women to enjoy a monopoly of the gains of prostitution (*Chinna Ummayi* v. *Tegarai Chetti*, I. L. R. 1 Mad. 168).

Length of time necessary to establish custom.

As to what length of time will constitute the *immemoriality* of a custom, the following remarks of Grey, C. J., may be considered:—"Although in this country we cannot go back to that period which constitutes legal memory in England, *viz.*, the reign of Richard I, yet still there must be some limitation without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773,

which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that, after that date, there can be no subsequent custom, nor any change made in the general law of the Hindus, unless it be by some Regulation by the Governor-General in Council, which has been duly registered in this Court.[a] In regard to the Mufassil, we ought to go back to 1793. Prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for twenty years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory (*Doe d. Jagomohan Rai* v. *Nimu Dasi*, Montriou's Cases of Hindu Law, 596).

But in one case in which there was a question as to whether tenures of a certain class were transferable by custom, the Calcutta High Court has said "It is sufficient if there is credible evidence of the existence and antiquity of the customs, and none to the contrary: there is no necessity for the witnesses to fix any particular time from which such tenures became transferable" (*Jai Krishna Mukharji* v. *Durga Narain Nag*, 11 W. R. 348).

Evidence relevant to prove custom.

According to the provisions of the above section, where the question is as to the existence of any right or custom, any transaction is relevant by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence. A statement contained in any deed, will, or other document which relates to any such transaction is relevant, if the person by whom such statement was made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense (see clause 7, section 32, *post*).

Thus, the plaintiffs and the defendant were entitled to *pallahs* or turns of worship of certain idols established some two hundred years previously by their ancestors. The plaintiffs contended that, according to the custom which had governed the worship, the idols could not be removed from Calcutta, and sought to restrain the defendant from removing them. In support of this contention they tendered in evidence a deed of agreement executed about a year and a half previously by a considerable majority of those entitled to *pallahs*, in which, after reciting the alleged custom, the parties to the deed covenanted with one another not to remove the idols from Calcutta during their respective *pallahs*. The defendant was not a party to this deed. It was held that this deed was admissible under the above section, but that it was worthless as evidence against the defendant, against whom the right claimed should be proved *aliunde* (*Haronath Mallik* v. *Nityanand Mallik*, 10 B. L. R. 263).

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[a] The 13 Geo. III, cap. 63, section 36, required all laws made by the Governor-General and Council to be registered in the Supreme Court; but this provision was rescinded by the 3 and 4 Wm. IV, cap. 85, section 45 (28th August, 1833).

The statement, written or verbal, giving the opinion of a person, not called as a witness for similar reasons, as to the existence of *any public right or custom*, as to the existence of which he would have been likely to be aware, is relevant, provided it were made before any controversy as to such right or custom had arisen (see clause 4, section 32, *post*). When the Court has to form an opinion as to the existence of any *general custom or right*—and this includes customs or rights common to any considerable class of persons—the opinion, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant (see section 48, *post*); and the grounds upon which such opinions are based are also relevant (section 51, *post*).

In the case of *Lachman Rai* v. *Akbar Khan*, I. L. R. 1 All. 440, Turner J., said: "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced. The acts required for the establishment of customary law should be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from a legal necessity. See also *Tara Chand* v. *Rib Ram*, 3 Mad. H. C. Rep. 50: *Gopalayyan* v. *Raghupatiayyan*, 7 Mad. H. C. Rep. 250: *Madhavrav Raghavendra* v. *Balkrishna Raghavendra*, 4 Bom. H. C. Rep. A. C. 113.

In *Vallabha* v. *Madusudanan* I. L. R. 12 Mad. 495, the use of a book of history to prove local custom was held not to be regular without calling the attention of the parties to it, and hearing them with reference to it.

In *Kudutula* v. *Mohini Mohun Saha* (5 R. C. and C. R. 290) decisions of the local Courts, when not conflicting, were held to be good evidence of a local custom of pre-emption. The proceedings in two former suits, where under similar circumstances, though the exercise of the right was disputed on other grounds, the right of pre-emption was admitted to exist, were held admissible in evidence in support of the custom. (*Madhab Chandra Nath Biswas* v. *Tomi Bewah*, 7 W. R. 210.) In *Gurdayal Mal* v. *Jhanda Mal*, I. L. R. 10 All. 585, which was also a suit for pre-emption based on custom, decrees passed in favour of such a custom, in suits in which it was alleged and denied, were held admissible as evidence to prove its existence. In this case it was said the most satisfactory evidence of the enforcement of a custom is a final decree based on the custom. But the conflicting decisions of subordinate Courts (three on one side and one on the other) are insufficient to prove the existence of the custom of pre-emption among the Hindus of Chittagong: *Indra Narain Chaudhri* v. *Mahomed Nazirudin*, 1 W. R. 234. A *wajib-ul-arz*, prepared and attested according to law, is *primâ facie* evidence of the existence of any custom of pre-emption which it records, such evidence being open to

Evidence admissible to prove local custom of pre-emption.

being rebutted by any one disputing such custom: *Isri Singh* v. *Ganga*, I. L. R. 2 All. 876. When a *wajib-ul-arz* has been made before Act XIX of 1873 came into force, the weight to be attached to its entries is still very strong, both as to proof of the contract, as well as of custom.—*Muhammad Husan* v. *Munna Lal*, I. L. R. 8 All. 434. But see *Uman Prasad* v. *Gandharp Singh*, L. R. 14 I. A, 127, I. L. R. 15 Calc. 20, in which it was ruled that a *wajib-ul-arz* was entitled to no weight as an authentic record of local custom, as it appeared to contain merely the views of the proprietor of the estate settled as to local custom, which the proprietor was entitled to have entered on the village records.

Mercantile usage.

Mercantile usage is provable by the multiplication or aggregation of a great number of particular instances showing a given course of business, and a general established understanding respecting it (*Mackenzie* v. *Dunlop*, 3 Macq. H. L. Cas. 22). Speaking of mercantile usage as one of the grounds upon which a plaintiff relied, the Privy Council said:—"To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in its growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract" (*Jago Mohan Ghosh* v. *Manikchand*, 7 Moo. I. A. 263: 4 W. R. P. C. 8). There is a distinction between the *general custom* of merchants which is part of the law of the realm and the particular usages of certain particular businesses. The term '*usage of trade*' is to be understood as referring to a particular usage, which is to be established by evidence of instances, and cannot be supported by evidence of opinion merely (*Cunningham* v. *Faublanque*, 6 C. and P. 44); while the general custom of merchants is in general to be collected from decisions, legal principles, and analogies, though on occasions evidence of such general custom has been received.* Evidence of the general opinion of merchants may be given in proof of the custom of merchants (*Camden* v. *Cowley*, 1 W. Bl. 417). Evidence of usage or custom is often introduced for the purpose of annexing an additional incident to a written contract or of explaining its terms—see proviso 5, section 92, *post*. See also section 1 of the Indian Contract Act, IX of 1872, which saves usages or customs of trade not inconsistent with the Act; and section 110 of the same Act, by which an implied warranty of goodness or quality may be established by the custom of any particular trade.

According to mercantile usage in the cotton trade in Tuticorin, when a merchant delivers over-delivery cotton to the owner of a cotton press, the property in the cotton vests in the owner of the cotton press, who is bound to give the merchant in exchange cotton of like quantity and quality. The

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* See 1 Smith's Leading Cases 610, 611, 7th edition; and *Edin.* v. *The East India Company*, 2 Burr. 1216.

transaction is not a sale, but an agreement for exchange, and when cotton thus delivered is accidentally destroyed by fire the loss falls on the owner of the press: *Volkart Brothers* v. *Vettivelu Nadan*, I. L. R. 11 Mad. 459. In a case decided by the Calcutta High Court, *Mackenzie Lyall & Co.* v. *Chamru Singh & Co.*, I. L. R. 16 Calc. 702, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at an auction sale was not at liberty to withdraw a bid made at the sale, but not at the time accepted by the plaintiff auctioneers, until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. It was, however, held that there was no sufficient evidence of the usage, being so universal as to become part of the contract by operation of law.[1] In *Smith* v. *Ludha Gholla Damodar*, I. L. R. 17 Bom. 129, evidence of a usage that delivery to a Railway at an inland town was equivalent to a shipment on board a vessel at a seaport town was held inadmissible, as being repugnant to or inconsistent with the express terms of the contract made between the parties.

Custom or usage is of especial importance in the administration of Hindu Law. In *Doe d. Jagomohan Rai* v. *Nimu Dasi* (Montriou's Cases of Hindu Law, p. 595) Grey, C. J., observed as follows:—"I have no hesitation in saying that we are bound to take notice of any special customs which may exist among the Hindus, or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindus. Mr. Ellis, of the Madras Civil Service, has shown that many customs and usages have been adopted from a former people by their Brahminical conquerors, and have become a part of the Hindu Code, although not in any degree founded on the Shastras. It may be said that, from the year 1756 to the year 1765, there was a double Government in this country, and during this period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident that many usages were then introduced that are now recognized as Hindu customs; and if any of the usages which were introduced at that period are relied upon as law, we are bound to take notice of them, should it be shown to us that they have become the written Law of the land. But even if they have not become written law, and they are specially pleaded, we must still recognize them as a valid subsisting custom, on the presumption that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this than there is in recognizing the local customs of England." "Custom," says Strange, "is a branch of Hindu, as it is of our own, law"[2];—and again, "*usage* being a branch of Hindu Law, which,

Custom an important portion of Hindu Law

[1] For another instance of a trade custom, see *Seth Samur Mal* v. *Chogo Lal*, I. L. R. 5 Calc. 421: L. R. 6, I. A. 238.
[2] Hindu Law, Ed. of 1880, Vol. I, p. 256.

wherever it obtains, supersedes its general maxims."[3] "Immemorial custom," says Manu, "is transcendent law."[4]

"The duty of an European Judge, who is under the obligation to administer Hindu Law," said their Lordships of the Privy Council in the case of *The Collector of Madura* v. *Mutu Ramalinga Sathupáthi*,[5] "is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by *usage*: for, *under the Hindu system of law, clear proof of usage will outweigh the written text of the law.* And again "The compiler of the Mitakshara is said to have been an ascetic or devotee and from that source nothing at variance with the religion of the Hindus is likely to have flowed. The Hindu Law contains in itself the principles of its own exposition. The digest *subordinates* in more than one place the language of texts to custom and approved usage". (*Bhyah Ram Singh* v. *Bhyah Agar Singh*, 13 Moo. I. A. 390). If an usage have obtained in a country, district, village, nation, tribe, class or family, such usage supersedes the general maxims of the law; but in order to supersede these general maxims, the usages must be such as have been continuously observed from time immemorial or for many generations.[6] When a custom has been proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom (*Nilkishto Deb Barmano* v. *Bir Chandra Thakur*, 12 Moo. I. A. 523). And where it is ancient, invariable, and established by clear and positive proof, it overrides the usual law of inheritance (*Kástúra Kumari* v. *Manohar Deo*, W. R. 1864, 39).

Kulachar and Desachar.

Family custom or usage is termed *kulachár*, and local usage is termed *desachar*. The latter, if it really exists, being a custom prevalent over a whole district, and not confined to one particular estate, must, from its universality, be more easily susceptible of proof than the former. In order to establish *kulachár*, it must be shown that the custom has been ancient and uninterrupted (*Amritnath Chaudhri* v. *Gauri Nath Chaudhri*, 6 B. L. R. 238). In *Nógendro Narain* v. *Raghunath Narain De* (W. R. 1864, 20) it was said that, in order to establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage has been ancient and invariable; and it should be established by clear and positive proof. In this case it was held that a family custom as to intermarriages, being matter of family history, might be proved by declarations made by members of the family. In *Ramalakshmi Ammal* v. *Sivananantha Perumal*

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[3] Hindu Law, ed. of 1880, Vol. I, p. 251.
[4] Chap. I, p. 138.
[5] 12 Moo. I. A. 436 : 1 B. L. R. P. C. 12 : and see *Matangini Debi* v. *Jaikali Debi*, 5 B. L. R. 469 : *Bhau Nanaji Utpát* v. *Sundrábái*, 11 Bom. H. C. Rep. 249; and *Tara Chand* v. *Rib Ram*, 3 Mad. H. C. Rep. 50, in which cases the origin and binding force of customary law were discussed.
[6] See Babu Shamacharan Sarkar's *Vyavastha Darpana*, pp. 314, *et seq.*

Sethurayar,[7] the Privy Council said :—"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India; but it is of the essence of special usages, modifying the ordinary law of succession, that they should be *ancient* and *invariable*; and it is further essential that they should be established to be so *by clear and unambiguous evidence*. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty[8] on which alone their legal title to recognition depends." In *Sivananja Perumal Saithurayar* v. *Athulatchmi Ammal* (3 Mad. H. C. Rep. 77) the Madras High Court said :—"It is not pretended that such a custom has at any time received judicial sanction; and what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt but be proved with certainty." So, in *Madhavrav Raghavendra* v. *Balkrishna Raghavendra*, 4 Bom. A. C. 113, it was said that evidence of the acts of a single family, repugnant or antagonistic to the general law, will not establish a valid custom or usage enforceable in a Court of Justice.

Discontinuance of family custom.

"A special course of descent in a family, differing from the ordinary course of descent in that place, of the property of that class or race, stands on the footing of usage or custom of the family; and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both" (*Súrendronath Rai* v. *Hiramani Barmanea*, 12 Moo. I. A. 81). In *Rajkishan Singh* v. *Ram Jai Sarma* (I. L. R. 1 Calc. 195) their Lordships of the Privy Council said, that they

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[7] 14 Moo. I. A. 585; 12 B. L. R. 396. 17 W. R. 553. As to the necessity of clear proof, see also *Serumah Umah* v. *Palathan Vitil Maryacoothy Umah*, 15 W. R. P. C. 47, and *Thakur Daryao Singh* v. *Thakur Dari Singh* (13 B. L. R. 165), in which latter case the mere fact of an estate not having been partitioned for six or seven generations was held by the Privy Council to be insufficient proof of a custom of impartibility.

[8] It must be certain and intelligible (*Bhagwan Das* v. *Balgobind Singh*, 1 B. L. R. S. N. ix). precise and conclusive (*Dúrga Persad Singh* v. *Durga Kúeri* (20 W. R. 157); uniform and persistent: *Vandravan Jekisun* v. *Manilal Chunilal*, I. L. R. 16 Bom. 470: must have had a legal origin and have continuance (*Súrendronath Rai* v. *Hiramani Barmanea*, 12 Moo. I. A. 81). See also *Vishnú* v. *Krishnan*, I. L. R. 7 Mad. 3. For instances of *kulachár* or family custom—see the cases of *Nil Kristo Deb Barmano* v. *Bir Chandra Thakur* (descent of the Tipperah Raj), 3 B. L. R. P. C. 13: *Rawut Arjun Sing and Rawut Durjun Singh* v. *Rawut Ghansiam Singh* (Raj of Rawatpore), 5 Moo. I. A. 169: *Chintaman Singh* v. *Nanlakho Kunwari*, I. L. R. 1 Calc. 153: *Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*, I. L. R. 8 Calc. 199: *Vira Rayen* v. *Valia Rani*, I. L. R. 3 Mad. 141. and for instances of *desachar*, see *Vayiniada* v. *Appu*, I. L. R. 9 Mad. 44. and *Viraragava* v. *Ramalinga*, I. L. R. 9 Mad. 148: *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri*, I. L. R. 7 Mad. 3: and *Keshavan* v. *Vasudevan*, I. L. R. 7 Mad. 297.

could "not find any principle or authority for holding that, in point of law, a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous; and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon."[a]

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[a] As to usage obtaining in the *Jangal Mahals* of Midnapur and *other districts*, by which landed estates, the proprietors of which have died intestate, devolve upon single heirs to the exclusion of the other heirs of the deceased, see Regulations XI of 1793 and X of 1800, pp. 224—226 and 330—334 of the *Author's Edition of the Bengal Regulations*, where the cases on the subject will be found collected.

With reference to the customs of Ghatwals, see pp. 429—440 of the same work. A number of cases upon family custom will be found at pp. 464 *et seq.* of Part II of Mr. Norton's *Leading cases on the Hindu Law of Inheritance.*

For other customs, see the following cases:— *Nilmadhab Gosámi* v. *Chandra Mukhi Gosámi*, 22 W. R. 397 (Custom of succession of "Bhabak Mahals"): *Bani Madhab Banarji* v. *Jai Krishna Mukharji*, 7 B. L. R. 152 (Tenures transferable): *Kastúra Kúmari* v. *Manohur Deo*, W. R. 1864. p. 39: *Jai Krishna Mukharji* v. *Durga Narain Nag*, 11 W. R. 348 (The same): (Custom of succession to *Ghatwali* tenures): *Har Lal Sing* v. *Jurawan Singh*, Ben. S. D. A. Rep. for 1837, p. 169 (The same): *Anandayyan* v. *Devarajayyan*, 2 Mad. H. C. Rep. 17 (A custom that some only of the *Mirasidars* of the village should bind the co-owners of the village lands): *Rahimatbdi* v. *Hirbái*, I. L. R. 3 Bom. 34 (Custom of inheritance among Khoja Mahomedans: opinion evidence not considered sufficient without instances): *Gobinda Das* v. *Ram Sahai Jamadar*, 1 Fulton's Rep. 217: the *Vyavastha Darpana* of Babu Shamacharan Sarkar, p. 330: *Kalian Das* v. *Bhagwathi*, I. L. R. 6 All. 47 (Custom that zamindar receives one-fourth the purchase-money of house in village sold privately): *Baijnath Prasad* v. *Mahomed Fazal Hossein*, 3 N.-W. P. Rep. 204 (Similar custom in case of involuntary sale) *Najban Bibi* v. *Chand Bibi*, L. R. 10 I. A. 133: I. L. R. 10 Calc. 238 (Custom of lease being resumable at lessor's pleasure): *Kadami Dasi* v. *Jotiram Kolita*, I. L. R. 3 Calc. 305 (Custom of divorce amongst Hindus): *Sadaratanissa* v. *Majada Khatun*, I. L. R. 3 Calc. 694 (Adoption of Hindu customs by Mahomedans): *Hakim Khan* v. *Gul Khan*, 10 C. L. R. 603 (Same—but custom opposed to ordinary law of inheritance not recognized): *Abdul Adud* v. *Mahomed Makmil*, I. L. R. 10 Calc. 562 (Same—burden of proving such adoption): *Mulda* v. *Sheo Baksh*, I. L. R. 3 All. 385 (Custom amongst Jats of Ajmir for person marrying widow to recoup family of late husband the expenses of marriage): *Abos Ali Zenul Aradin* v. *Ghulam Muhamad*, 1 Bom. H. C. Rep. 36 (Local custom in the Broach district that *wakf* land left as a religious endowment may be mortgaged, although such practice is contrary to Mahomedan Law): *Bai Khedu* v. *Dasu Lall*, 5 Bom. H. C. Rep. A. C. 123: *Pran Jivan Dayaram* v. *Bai Reva*, I. L. R. 5 Bom. 482 (Evidence of custom of succession to *bhagdari* lands in the Broach Collectorate). As to the succession to Mohunts, see *Ganosh Gir* v. *Omrao Gir*, Ben. S. D. A. Rep. for 1807, p. 218: *Ganga Das* v. *Telak Das*, Ben. S. D. A. Rep. for 1810, p. 309: *Narain Das* v. *Brindabun Das*, Ben. S. D. A. Rep. for

The obligatory force of custom has been in many instances recognized by the Indian Legislature. It has been recognized as legalizing the inheritance of one heir in certain districts of Bengal (Reg. X of 1800, and Reg. XII of 1805, section 36).

Custom recognized by the Legislature.

1815, p. 151: *Raja Muttu Rasralinga Setupati* v. *Perianayagum Pillai*, L. R. 1 I. A. 209 (The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain (if that be possible) the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them): *Raja Varma Valia* v. *Rani Varma Mutha*, L. R. 4 I. A. 76: I. L. R. 1 Mad. 235: *Rayanmakanagath Kunhi Bivi Sheriff* v. *Cheriya Pudiagath Abdul Aziz*, I. L. R. 6 Mad. 103 (Proof that the management of most mosques in a certain district is in the hands of persons who would inherit under the *Marumakkattayam* law will not warant a finding of the existence of such a custom in such district).

As to the customary law of Jains, see *Bhagvandas Tejmal* v. *Rajmal* alias *Hiralal Lachmandas*, 10 Bom. H. C. Rep. 241. *Hasan Ali* v. *Naga Mal*, I. L. R. 1 All. 288: *Sheo Singh Rai* v. *Dakkho and Murari Lal*, L. R. 5 I. A. 87: I. L. R. 1 All. 688: *Chotay Lall* v. *Chunnu Lall*, I. L. R. 4 Calc. 744: *Bachebi* v. *Makhan Lal*, I. L. R. 3 All. 55: *Lakhmi Chand* v. *Gatto Bai*, I. L. R. 8 All. 319. As to how far custom affects the law of inheritance amongst the Cutchi Memons, see *In re Haji Ismail Haji Abdula*, I. L. R. 6 Bom. 452: *Ashabai* v. *Haji Tyeb Haji Rahimtulla*, I. L. R. 9 Bom. 115: *Mahomed Sidick* v. *Haji Ahmed*, I. L. R. 10 Bom. 1. Easements may be acquired by local custom: *Mohan Lal* v. *Nur Ahmad*, All. H. C. Rep. 1869, 116: *Secretary of State for India* v. *Mathurabhai*, I. L. R. 14 Bom. 213: *Narasayya* v. *Sami*, I. L. R. 12 Mad. 43; and so may rights resembling easements: *Ashraf Ali* v. *Jagannath*, I. L. R. 6 All. 497. It has also been held that a right of privacy may now be acquired by custom (*Lachman Prasad* v. *Jamna Prasad*, I. L. R. 10 All. 162: *Gokal Prasad* v. *Radho*, I. L. R. 10 All. 358). According to local custom in Guzerat, an invasion of privacy has always been an actionable wrong: *Manishankar Hargovan* v. *Trikam Narsi*, 5 Bom. H. C. Rep. 42: *Keshav Harkha* v. *Ganpat Hira Chand*, 8 Bom. H. C. Rep. A. C. 87: *Kuvurji Prem Chand* v. *Bai Javer*, 6 Bom. H. C. Rep. 143.

On the subject of a *local custom of pre-emption* amongst persons other than Mahomedans, the following cases may be consulted—*Jai Koer* v. *Sarup Narain Thakur*, W. R., 1864, [illegible]. *Ramgati Sarma* v. *Kasi Chandra Sarma*, W. R., 1864, 317: *Sheojatan Rai* v. *Anwar Ali*, 13 W. R. 189: *Ram Dular Misser* v. *Jhumak Lal Misser*, 8 B. L. R. 455: 17 W. R. 265 (Hindus in Behar): *Fakir Rawot* v. *Imam Baksh*, B. L. R. Sup. Vol. (F. B.) 35, and W. R. (F. B.) 143 (Hindus in Behar—custom presumed, unless contrary be shown, to be founded on and co-extensive with Mahomedan Law): *Kantiram* v. *Wali Sahu*, 2 B. L. R. A. C. 330: 11 W. R. 251 (Hindus in Purnea): *Maheshi Lal* v. *Christian*, 6 W. R. 250 (Christians in Bhaugulpore): *Seraj Ali Chaudhri* v. *Ramzan Bibi*, 8 W. R. 204 (Hindu defendant not bound by Mahomedan Law, unless there be proof of custom): *Habibal Hosein* v. *Deoki Nandan*, W. R., 1864, p. 74 (To the same effect—24 Parganas): *Munwar Ali* v. *Azhar-udin Mahomed*, 5 W. R. 270 (To the same effect—Tipperah): *Indra Narain Chaudhri* v. *Mahomed Nazirudin*, 1 W. R. 234, on review, 5 W. R. 237 (Hindus in Chittagong): *Madhub Chandra Nath Biswas* v. *Tomi Bewah*, 5 W. R. 279 (Hindus in Jessore): *Jamilah Khatun* v. *Pagal Ram*, 1 W. R. 251 (Between Mahomedans and Hindus in Sylhet): *Gordhandas Girdharbhai* v. *Prankor*, 6 Bom. H. C. Rep. A. C. 268 (Hindus in Guzerat): *Benarsi Das* v. *Phul Chand*, 1 N.-W. P. Rep. C. A. 243. (A solitary case or two, not sufficient proof): *Dwarka Das* v. *Hussain Baksh*, I. L. R. 1 All. 564 (Held by three out of five Judges that, where the vendor is a Hindu, a suit to enforce a right of pre-emption founded upon Mahomedan Law is not maintainable): *Hira* v. *Kallu*, I. L. R. 7 All. 916 (may exist amongst Hindus). *Gur Dayal Mal* v. *Jhandu Mal*, I. L. R. 10 All. 585 (a decree based on a custom good evidence).

Local custom of pre-emption.

Section 2 of Bengal Reg. XI of 1825 enacts that, whenever any clear and definite usage as to alluvion and diluvion respecting the disjunction and junction of land by the encroachment or recess of a river may have been *immemorially established* for determining the rights of the proprietors of two or more contiguous estates divided by a river, the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage. Clause 5, section 4 of the same Regulation, enacts that, in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or of the sea, not specifically provided for by that Regulation, the Courts of Justice shall be guided by the best evidence they may be able to obtain of *established local usage*, if there be any applicable to the case, or if not, by general principles of equity and justice.[1]

In Madras it has been enacted that by custom the employment of forced labour on village irrigation and drainage works is lawful (Madras Act I of 1858, section 6). Civil Courts are bound to give effect to custom by Bombay Regulation IV of 1827, section 26; the Punjab Laws Act, 1872, sections 5 and 7; the Madras Civil Courts Act, III of 1873, section 16; the Arakan Hills Civil Justice Regulation, VIII of 1874, section 4; the Central Provinces Laws Act, XX of 1875, section 5; the Tarai Regulation, IV of 1876, section 5; the Oudh Laws Act, XVIII of 1876, sections 3 (*b*), 4 and 8; the Ajmere Regulation, III of 1877, section 4; and the Burmah Courts Act, XI of 1889, section 4. The binding force of custom has been specially recognized by the laws prevailing in the Punjab. In addition to Act XIV of 1872, sections 5 and 7, the Punjab Land Revenue Act, XXXIII of 1871, section 6, provides that it shall be regarded in the appointment of village officers, and Punjab Act, XVII of 1877, section 33, enacts that a decision having failed to determine any question as to custom alleged to have the force of law, shall form ground for a second appeal. The provisions of sections 1 and 110 of the Indian Contract Act, IX of 1872, have already been referred to (p. 110.) But custom cannot override the plain terms of a written contract: *Indra Chandra Dugar* v. *Lachmi Bibi*, 7 B. L. R. 682 · 15 W. R. 501. Nor can it be allowed to override the positive prescriptions of the Limitation Act: *Mohan Lal Jechand* v. *Amrat Lal Bechardas*, I L. R. 3 Bom. 174. Section 1 of the Indian Trusts Act, II of 1882, saves the mutual relations of the members of an undivided family as determined by customary law from being affected by the provisions of the Act. Custom has been further recognized by the Punjab Frontier Regulation I of 1872, section 13, rules 6, 8, 47, and 48; the North Western Provinces Land Revenue Act, XIX of 1873, sections 25, 26, 28, 44, and 47; the Oudh Land Revenue Act, XVII of 1876, section 31; the North Western Provinces Rent Act, XII of 1881, section 20; the Central Provinces Land Revenue Act, XVIII of 1881, section 67, and the Bengal Tenancy Act, VIII of 1885, section 183, *et passim*.

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[1] See pp. 582, 605, of the Author's *Edition of the Bengal Regulations*, where the cases will be found collected.

Facts showing existence of state of mind, or of body or bodily feeling.

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

As to state of mind or body, see also clause 2 of section 21, *post*.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.[2]

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.[2]

Illustrations.

(*a*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

See Roscoe's Criminal Evidence, page 98.

In the case of *R.* v. *Purbhudás Ambaram* (11 Bom. H.C. Rep. 90) Purbhudás was charged with having forged a promissory note, and the other four accused with having abetted this offence. In the possession of four of the accused persons were found some one hundred and fifty papers, which were alleged to be forgeries or inchoate forgeries. It was decided that these papers were improperly admitted as evidence. The English cases of *R.* v. *Crocker* (2 Leach 987) and *Griffiths* v. *Payne* (11 A. and E. 131) were referred to, and it was held that the Evidence Act did not alter the law as settled thereby. Where the accused was charged with receiving an illegal gratification from X on three occasions in 1876, evidence of other but unconnected illegal gratifications having been received from X in 1877 and 1878 was held inadmissible upon such charge (*Empress* v. *Vya Poory Mooddeliar*, I. L. R. 6 Calc. 655: 8 C. L. R. 197).

[2] These *Explanations* were substituted for the original *Explanation* to section 14 by Act III of 1891, section 1 (1).

But in *Queen-Empress* v. *Vajiram*, I. L. R. 16 Bom. 414, in which the accused was charged under section 206, P.C., with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized in execution of a decree, evidence of five other fraudulent transfers of property effected by the accused on the same day and apparently with the same object, were held admissible under this section and section 15 (*post*) to prove either that all those transfers were parts of one entire transaction, or that the particular transfers specified in the charge were made with a fraudulent intent. See the observations of TELANG, J., in this case on the subject of the English cases bearing on this subject. The facts mentioned in the second clause of the illustration have been held not to justify a conviction under section 413, Penal Code, of being a habitual receiver of stolen property. *Queen-Empress* v. *Baburam Ansari*, I. L. R. 19 Calc. 190.

(*b*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

[See Illustration (*c*) to section 15, *post*; *R.* v. *Foster*, 24 L. J. M. C. 134 and *Queen-Empress* v. *Nur Mahomed*, I. L. R. 8 Bom. 223.]

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.[3]

(*c*) A sues B for damage done by a dog of B's, which B know to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

[See *Thomas* v. *Morgan*, 2 C. M. and R. 496. *Kelly* v. *Wade*, 12 Ir. Law R. 424: *Cox* v. *Burbidge*, 13 Com. B. N. S. 430.]

(*d*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

[See *Gibson* v. *Hunter*, 2 H. Bl. 288.]

(*e*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

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[3] This *Illustration* was substituted for the original *Illustration* (*b*) to section 14 by Act III of 1891, section 1 (2).

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

[*Long* v. *Barrett*, 7 Ir. Law R. 439: *Barrett* v. *Long*, 8 Ir. Law R. 331 · and *Kaikhusru Naoroji Kabraji* v. *Jehangir Byramji Murzban* I. L. R. 14 Bom. 532.]

The facts that there was no previous quarrel between A and B and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

[*Sheen* v. *Bumpstead*, 1 Hurlstone and Coltman's Rep. 358; 2 New Rep. 370.]

(*g*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

[*Gerish* v. *Chartier*, 1 Com. B. 13.]

(*h*) A is accused of the dishonest misappropriation of property which he had found, and the question is, whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

[*R.* v. *Voke*, R. and R. 531.]

(*j*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

[*R.* v. *Robinson*, 2 East P. C. 1110, 1112.]

(*k*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(*l*) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(*m*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

[See *Aveson* v. *Lord Kinnaird*, 6 East, 188.]

(*n*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(*o*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A on other occasions shot at B, is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(*p*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional [or done with a particular knowledge or intention],[4] the fact that such act formed part of

[4] The words in brackets were added by section 2, Act VIII of 1891.

a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(*a*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

[*R.* v. *Gray*, 4 F. and F 1102]

(*b*) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false and that the false entry is in each case in favour of A, are relevant.

[*Reg* v *Richardson*, 2 F and F. 343]

(*c*) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E, are relevant, as showing that the delivery to A was not accidental.

[See Tay: § 322, § 345, 8th edn., illustration (*b*) to section 14, *ante*, and and *Queen-Empress* v. *Nur Mahomed*, I. L. R 8 Bom., 223. The case of *Queen Empress* v. *Vajiram*, I. L. R. 16 Bom. 414, may also be consulted.

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

[*Hetherington* v. *Kemp*, 4 Camp. 193.]

(*b*) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

[*Warren* v. *Warren*, 1 C. M. and R. 250]

The postmark on a letter is *primâ facie* evidence that the letter was in the post at the time and place therein specified.

In English law the matter of this section has usually been dealt with as a *presumption*,—*i.e.*, the ordinary course of business is proved and the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule: Tayl. § 147: § 179, 8th edn. The following passage from Mr. Taylor's work will still further illustrate the principle:—"If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume *primâ facie* that they reached his hands. The fact, too, of sending a letter to the post-office will, in general, be regarded by a jury as presumptively proved, if the letter be shown to have been handed to, or left with, the clerk whose duty it was, in the ordinary course of business, to carry it to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose." § 148: § 182, 8th edition.

In *Lutf Ali Miah* v. *Piari Mohan Rai*, 16 W. R. 223, the Calcutta High Court has held that if a person refuses a registered letter sent by post he annot afterwards plead ignorance of its contents, and in *Jogendro Chandra Ghosh* v. *Dwarkanath Karmoker*, I. L. R. 15 Calc. 681, in which case a notice to quit had been sent by a registered letter, the posting of which was proved, and the notice was produced in Court in the cover in which it had been despatched with an endorsement on the cover purporting to be by an officer of the post-office stating that the addressee had refused to receive the letter, it was held, following *Lutf Ali Miah* v. *Piari Mohan Rai* and *Papillon* v. *Brunton*, 5 H. and N. 518, that the notice had been duly served. But in a case in the Allahabad High Court, *Ram Das Chakravartti* v. *The Official Liquidator, Cotton Ginning Company, Ld., Cawnpore*, I. L. R. 9 All. 366, press copies of two letters were held inadmissible for the purpose of proving that a notice of allotment of shares had been duly communicated. There was no evidence of the posting of the original letters, or of the address they bore, and all that was proved was that they were contained in the press copy letter book of the Company, and that they were in the handwriting of a deceased Secretary of the Company. They were, therefore, held to be no proof of the communication of any notice of allotment.

See also section 114, and Illustration (*f*) thereto, *post*.

ADMISSIONS.

Admission defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

See the definition of '*document*' in section 3, *ante*, page 34.

In English law the term 'admission' is usually applied to civil transactions and employed in *civil cases*, while the term 'confession' is confined to acknowledgments of guilt and *to criminal cases*. This distinction has not been adopted in this Code; for the provisions of sections 17—22 are applicable to criminal as well as civil cases.

A letter does not require a stamp, merely because it contains an admission (*Sital Persad* v. *Monohar Das*, 23 W. R. 325). See also *Narain Kumari* v. *Ramkrishna Das* (I. L. R. 5 Calc. 864 · 6 C. L. R. 286), where an entry, showing the extent of the holding and the amount of rent, made in a book belonging to the lessor and signed by the lessee, was held relevant as an admission.

Admission—
by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character;

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by —

by party interested in subject-matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Admissions by parties.

A common form of admission is a statement made by a party in a former suit either in a written statement or in a deposition (*Harinath Sirkar* v. *Prionath Sirkar*, 7 W. R. 249: *Bhai Gobind Chaudhri* v. *Bijai Gobind Chaudhri*, 9 W. R. 162: *Forbes* v. *Mahomed Taki*, 5 B. L. R. 329: 14 W. R. P. C. 28: 13 Moo. I. A. 438: *Sheo Saran Singh* v. *Ram Khelawan Singh*, 14 W. R. 165: *Girish Chandra Lahiri* v. *Shama Charan Sandyal*, 15 W. R. 437: *Bhagwan Chandra Datta* v. *Mechu Lal Chakravarti*, 17 W. R. 372: *Harish Chandra Mallik* v. *Prasanno Kumar Banerji*, 22 W. R. 303: *Jugdeo Sahai* v. *Digambar Rai*, 22 W. R. 204: *Kashi Kishor Rai Chaudhri* v. *Bama Sundari Debi*, 23 W. R. 27). Such written statements, when required by law to be recorded, must, in order to be admissible, have been recorded in accordance with the requirements of the law (*Pogha Mahtun* v *Ganesh Ram*, 24 W. R. 114). As to the effect of informalities in recording depositions, see *Empress* v. *Mayadeb Gossami*, I. L. R 6 Calc. 762: 8 C. L. R. 292.

In one case, *Mohan Saha* v. *Chalta Mowar*, 21 W. R. 34, the father of the defendant had asked certain witnesses to verify his signature to a petition or to identify him as one of the petitioners, but it was not proved that this petition had ever been actually filed. It was, however, held that this amounted to a statement on the part of the defendant's father to these witnesses of all that was contained in the petition, and was as effective as evidence against the defendant as if it had been filed. In another case a deposition of the defendant in a previous suit in which he had been a witness and a recital by him in a deed of sale were admitted as evidence both against him and against those claiming under him, though he was alive and had not been called as a witness. It was observed that the deposition though not admissible under section 32, was admissible under the sections relating to admissions, although it might be shewn that the facts were different from what they were stated in the former case to be: *Sujan Bibi* v. *Achmat Ali*, 14 B. L. R. App. 3: 21 W. R. 414.

Admissions by agents.

"Where," says Mr. Justice Story, "the acts of the agent will bind the principal, there, his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. In a suit against a railroad company by a passenger for the loss of his trunk, the admissions of the conductor, baggage-master or station-master as to the manner of the loss, made the next morning in answer to enquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers and to account for the same if missing, and enquiry is made within a reasonable time"—(Story on Agency, § 134). The same learned writer remarks:—"The representation, declaration, or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*." (§ 135.)

The words of the section, "*whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them,*" leave it open to the Courts to deal with each case that arises upon its own merits. Mr. Story's observations, though not founded on precedents binding in India, may yet be borne in mind as showing the principles generally applied in a country in which the decisions of the tribunals are not fettered by technicalities. These principles will be found clearly set forth in paras. 131 to 139a of Mr. Story's work on Agency, which may be usefully referred to. As a general rule, both in England and America, the admissions of an agent have been held binding on the principal only when they have been made during the continuance of the agency in regard to a transaction then depending, and when they have been within the scope of the agent's authority. The admissions of an agent cannot bind an infant, because an infant cannot appoint an agent. The guardian of a minor has no authority to bind his ward by admissions of previous transactions (see remarks of the Privy Council in *Suraj Mukhi Kunwar* v. *Bhagwati Kunwar*, 10 C. L. R. 377. But see *Abdul Hai* v. *Beni Prasad*, 21 W. R. 228).

As to how far Barristers, Solicitors, and Vakils are agents to bind their clients by admissions, see *ante* pp. 30—32 *note*.

Partners.

Partners are agents for each other. "Whenever any number of persons are associated together in the joint prosecution of a common enterprise or design, as in commercial partnerships and similar cases, the act or declaration of each member in furtherance of the common object of the association is the act or declaration of all. By the very act of association each partner is constituted the agent of the others for all purposes within the scope of the partnership concern."—(Taylor on Evidence, § 595, § 598, 8th edn., and see Story on Partnership, §§ 101—125). There is, however, one case in which the admission of a partner cannot be used against his co-partners. Section 21 of the Indian Limitation Act (XV of 1877) enacts that one of several joint contractors, *partners*, executors, or mortgagees shall not be made chargeable by reason only of a written acknowledgment signed by, or by the agent of, any other or others of them.

Co-defendants.

An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant (*Amirtalal Basu* v. *Rajanikanth Mitra*, L. R. 2 I. A. 113 : 15 B. L. R. 10 : 23 W. R. 214 : *Niamatullah Khadim* v. *Himmat Ali Khadim*, 22 W. R. 519 : *Lachman Singh* v. *Tansukh*, I. L. R. 6 All. 395 : *Azizullah Khan* v. *Ahmad Ali Khan*, I. L. R. 7 All. 353), and when two persons were sued for rent as joint tenants, and one of them admitted the correctness of the plaintiff's claim, it was held that the admission of the one of the two joint defendants could not bind the other, and that as they had been sued on the allegation that they held the holding jointly, a separate decree for half the amount admitted could not be made against the tenant who had made the admission (*Chandareshwar Narain Prasad* v. *Chuni Ahir*, 9 C. L. R. 359). So, an admission by one raiyat as to the rate

at which he holds (though against his own interest) is not evidence to prove the rate at which another raiyat holds (*Narohari Mahant* v. *Naraini Dasi*, W. R. F. B. 23). But see *Kausuliah Sundari Dasi* v. *Mukta Sundari Dasi*, I. L. R. 11 Calc. 588, *post*, p. 128.

The effect under the Limitation Act, XV of 1877, of an acknowledgment in writing may here be noticed. Section 19 of this Act is as follows:—"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed."

Effect of acknowledgment in writing to bar limitation.

"When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received."

"*Explanation* 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right."

"*Explanation* 2.—In this section 'signed' means signed either personally or by an agent duly authorized in this behalf."

Where the whole of an account stated was written by the debtor himself and his name was introduced in his own handwriting at the top, there was held to be a sufficient signature to satisfy the section (*Jekisan Bapuji* v. *Phoosar Bhoga Jetha*, I. L. R. 5 Bom. 89: *Andarji Kalyanji* v. *Dulabh Jeevan*, I. L. R. 5 Bom. 88).

An acknowledgment made before the Act came into force is sufficient: *Mohesh Lal* v. *Basant Kumari*, I. L. R. 6 Calc. 340: 7 C. L. R. 121. But see the construction put upon the words "prescribed period" in *Luvár Chunilal Ichhárám* v. *Luvár Tribhovan Laldas* (I. L. R. 5 Bom. 688): *Ramji* v. *Dharma*, I. L. R. 6 Bom. 683: and *Dharma Vithal* v. *Govind Sadvalkar*, I. L. R. 8 Bom. 99. The signature of an agent for the collection of rent must be affixed to the acknowledgment within one year of the termination of his agency: *Parbati Nath Rai* v. *Tezomai Banarji*, I. L. R. 5 Calc. 303. If the original acknowledgment had been lost or destroyed, secondary evidence of its contents may be given: *Sambhu Nath Nath* v. *Ram Chandra Shaha*, I. L. R. 12 Calc. 267: *Wajiban* v. *Kadir Baksh*, I. L. R. 13 Calc. 292: *Chathu* v. *Virarayan*, I. L. R. 15 Mad. 491. But see *Dinamayi Debi* v. *Rai Lachmipat Singh*, L. R. 7 I. A. 8: *Ziulnissa Ladli Begam Saheb* v. *Motidev Ratandev*, I. L. R. 12 Bom. 268. As to an acknowledgment in a *khatta* bearing a one-anna stamp, see *Chowksi Himutlal Harivulubhdas* v. *Chowksi Achrutlal Harivulubhdas*, I. L. R. 8 Bom. 194.

A Full Bench of the Allahabad High Court has held that an application for the execution of a decree is an application in respect of a 'right' (*i.e.*, the right of the decree-holder to execution) within the meaning of section 19 of the Limitation Act; that an application in writing by a judgment-debtor for the postponement of a sale in execution and the issue of fresh sale notifications is an acknowledgment of liability in respect of such right, and that such acknowledgment signed by a pleader expressly authorized in that behalf is signed by an 'agent' duly authorized within the meaning of the section (*Ramhit Rai* v. *Salgur Rai*, I. L. R. 3 All. 247: see also *Janki Prasad* v. *Ghulam Ali*, I. L. R. 5 All. 201). A similar view has been taken by two Division Benches of the Calcutta High Court (*Ram Kumar Kar* v. *Jakur Ali*, I. L. R. 8 Calc. 716: 10 C. L. R. 613: *Tori Mahomed* v. *Mahomed Mabud Baksh*, I. L. R. 9 Calc. 730: 13 C. L. R. 91), and by the Bombay High Court in *Venkatrav Bapu* v. *Bijesing Vithal Singh*, I. L. R. 10 Bom. 108. A Full Bench of the Madras High Court has taken a contrary view, and expressly dissented from *Ramhit Rai* v. *Salgur Rai* (*Rámá Rau* v. *Venkatesa Bhandari*, I. L. R. 5 Mad. 171). B's agent, by order of B, wrote a letter to S, containing an acknowledgment of a debt. The letter was headed "Written by B to S," and the concluding portion was written by B with his own hand. The letter was not signed at foot, Hindu bankers not being in the habit of signing in this manner. It was held that there was a good signature by a duly authorized agent (*Mathura Das* v. *Babu Lal*, I. L. R. 1 All. 683).

So also where a balance of account was written by a person at the request of an illiterate debtor in the debtor's name, and signed by the writer in his own name (*Hemchand Kaber* v. *Vohora Eaji Haji*, I. L. R. 7 Bom. 515).

The manager of a Hindu family may *acknowledge* debts, but has no power to *revive* a claim barred by limitation, unless expressly authorized to do so (*Chinnaya Naydu* v. *Gurunatham Chetti*, F. B. I. L. R. 5 Mad. 169: *Gopal Narain Mazumdar* v. *Maddomati Gupti*, 14 B. L. R. 21: *Kumarasami Nadan* v. *Palanagappa Chetti*, I. L. R. 1 Mad. 385).

The signature of a guardian will not bind a minor (*Azudin Hosein* v. *Lloyd*, 13 C. L. R. 112: *Wajiban* v. *Kadir Baksh*, I. L. R. 13 Calc. 292).

Statements made by suitor in representative character.

The following are instances of persons holding a representative character: the assignee of a bankrupt, an executor or administrator, the manager of a minor's property holding a certicate under Act XL of 1858. As to executors and administrators, see the Indian Succession Act, X of 1865, the Hindu Wills Act, XXI of 1870, and the Probate and Administration Act, V of 1881. Merely to speak of the "plaintiff-assignee," is not an admission of the plaintiff's title as assignee (*Clark* v. *Rup Lal Mullik*, 2 Moo. I. A. 263). The admissions of the executor of the donor must be treated as the admissions of the donor (*Dwarkanath Basu* v. *Chandi Charan Mukharji*, 1 W. R. 339. The admission of one executor will not bind another, particularly if not made in the character of executor (*Chandra Kant Mitra* v. *Ram Narain De Sirkar*, 8 W. R. 63). When a party applies

to execute a decree on behalf of a minor, his representative capacity comes to an end by the death of that minor; and further steps in execution or otherwise must be taken by the legal representative of the deceased, whoever that may be (*Halodhar Rai Chaudhri* v. *Jadunath Mukharji*, 14 W. R. 162).

Statements by interested persons.

It has been decided in England and in America that the admissions of one partner, made *after* the dissolution of the partnership, *in regard to the business of the firm previously transacted*, are admissible as evidence against all the partners (*Loomis and Jackson* v. *Loomis*, 3 Deane's Reports of the Supreme Court of Vermont, 198; *Pritchard* v. *Draper*, 1 Russ. and Myl. 191, 199, 200). As the liability of each partner continues in respect of such transactions, his *interest* may be held to continue also.

The reason of the rule that admissions, in order to be relevant, must have been made *during the continuance of the interest* of the persons making them, is this, that it would be inequitable to allow a person who has parted with his interest in property to divest the right of another claiming under him, by any statement which he may choose to make (*Khenam Kari Chaudhurain* v. *Gaur Chandra Mazumdar*, 5 W. R. 268).

The case of *Kausuliah Sundari Dasi* v. *Mukta Sundari Dasi*, I. L. R. 11 Calc. 588, would seem to have been decided on the principle laid down in clause 3 (1) of this section. The facts of this case are that in a suit between a *zamindar* and his *izaradars* for rent, a person who was one of several *jotedars* in the *mahal*, was called as a witness for the *zamindar*, and admitted the fact that an arrangement existed whereby he and his co-jotedars had agreed to pay rent to the *zamindar* direct. This suit was decided in favour of the *zamindar*. The *izaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned to recover the sum which the *jotedars* ought to have paid to the *zamindar* direct, and which the *izaradars* had been decreed to pay. The *joteaars* denied their liability, and the deposition of the *jotedar* was given in evidence as proof of the alleged arrangement and held to be admissible. Garth, C. J., in his judgment observed :—"Where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence against the others." He then cited a passage from Taylor on Evidence (Vol. I, § 743: § 655, 8th edn., in which it is said :—"Where several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." "The principle of this rule is," Sir R. Garth went on to say, "that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor

is considered to be the agent of the others, and this rule, as I take it, is enacted, though in a somewhat concise form, in section 18 of the Indian Evidence Act." But see *ante*, p. 126.

It is not sufficient that the interest be *subsequent in point of time:* it must have been *derived from* the person who made the statement sought to be used as an admission. Instances of the application of this rule will be found in *Nand Pandah* v. *Gyadhar*, 10 W. R. 89: *Gaur Lal Singh* v. *Mohesh Narain Ghosh*, 14 W. R. 484: and *Audh Bihari Singh* v. *Ram Raj Tewari*, 18 W. R. 105.

It is to be observed that admissions are relevant only so far as the interests of the persons who made them or of those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *patnidar* or other holder of a subordinate tenure affects the *patni* or other tenure as against him and those who derive their title from him, but it will not affect the proprietary interest as against the zamindar or other superior so as to encumber or diminish *his* rights. See clause 3, section 32, *post*.

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

See Taylor, § 688, § 759: 8th edn. Another instance is the following:—A and B are jointly liable for a sum of money to C, who brings an action against A alone. A objects that he cannot singly or severally be made liable, and that B should be joined as a co-defendant, being jointly liable. An admission by B as to his joint liability is relevant between A and C. Such statements are original evidence and not hearsay, though the person who is said to have made the admissions is alive, and has not been cited as a witness (*Ali Moidin* v. *Kombi*, I. L. R. 5 Mad. 239).

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B—"Go and ask C; C knows all about it." C's statement is an admission.

"In the application of this principle," says Mr. Taylor, "it matters not whether the question referred be one of law or of fact; whether the person to whom reference is made have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action on contract or in an action for tort." See the subject discussed—Tay. §§ 689—693: §§ 760—765, 8th edn. There has been some conflict of decision in England as to whether the answer of the referee is conclusive against the party who makes the reference. Mr. Taylor observes that the purposes of justice and policy are sufficiently answered by throwing the burden of proof on the opposing party, as in the case of an award, and by holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake. In dealing with this question under the Code, the provisions of section 31, *post*, must be borne in mind.

Proof of admissions against persons making them, and by or on their behalf.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

As to state of mind or body, see also section 14, *ante*.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B, that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b*) A, the Captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties if he were dead, under section 32 clause (2).

(*c*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because if A were dead, it would be admissible under section 32, clause (2).

(*d*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Representatives in interest.

It has been held by the Calcutta High Court that the purchaser of an estate sold for arrears of revenue is not the privy in estate of the defaulting proprietor: he does not derive his title from him, and is bound neither by his acts nor his

Hiches (*Bulul Rahuman* v. *Pran Dhan Dutt*, 8 W. R. 222: *Golak Mani Dasi* v. *Haro Chandra Ghosh*, 8 W. R. 62: *Watson & Co.* v. *Nobin Mohan*, 10 W. R. 72). In the case of *Kaldip Narain Singh* v. *The Government of India, Mahadeo Singh and others* (11 B. L. R. 71) their Lordships of the Privy Council said:—"The only advantage which he gains by the character of *auction-purchaser* is, that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *zamindar*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *zamindari*." See also, as to the rights of an auction-purchaser, *Forbes* v. *Mir Mahomed Hosein*, 20 W. R. 44, and as to the non-admissibility against him of proceedings between the defaulting proprietor and third parties in respect of the title to the land, see *Radha Gobind Koer* v. *Rakhal Das Mukharji*, I. L. R. 12 Calc. 90.

There has been some conflict of decision as to whether the purchaser at an ordinary execution-sale is or is not the representative in interest of the judgment debtor within the meaning of this section. In an early case (*Rango Mon Debi* v. *Raj Kumari*, 6 W. R., 197), it was held that such a purchaser is not bound by any admission made by his execution-debtor, nor ordinarily by a decree against him. So, in *Imrit Koer* v. *Debi Prashad Singh*, 18 W. R., 200, it was held that an admission by the execution-debtor did not bind him, but so far as it could be considered as his, could at the utmost be used as evidence against him. But in *Annapurna Dasi* v. *Nafar Poddar*, 21 W. R. 145, it was ruled that the purchaser of property at an execution-sale is the *representative in interest* of the judgment-debtor, whose right, title and interest he has purchased. In *Enayet Hosein* v. *Giridhari Lal* (2 B. L. R. P. C. 78) the Privy Council said:—"There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution-sale as contra-distinguished from the representatives of any person claiming under an ordinary assignment or conveyance. In the opinions of their Lordships there is no foundation in principle or authority for any such distinction." So in *Tara Prasad Mitra* v. *Ram Narsingh Mitra*, 6 B. L. R. App. 5 14 W. R. 283, it was held that the purchaser of a patni taluk, sold under Reg. VIII of 1819, was bound by a decree given against the former holder of the patni.

In another case, A, having both the *zamindari* and *patni* interest in himself, sued B as *darpatnidar* for rent. B successfully pleaded that he had conveyed his *darpatni* interest to C, whereupon A sued C for rent, obtained a decree, and in execution thereof brought to sale the right, title and interest in the *darpatni* tenure, and purchased it himself. X, claiming to be mortgagee from B, and to have purchased the *darpatni* interest at a sale in execution of a decree obtained upon his mortgage, intervened in a suit for rent brought by A against an *ijaradar* or farmer of lands within the *darpatni* tenure. Held, that X was bound by B's disclaimer (*Poreshnath*

Mulharji v. *Anathnath Deb*, L. R. 9 I. A. 147; I. L. R. 9 Calc. 265). See also *Bapuji Balal* v. *Satyabhamabai*, I. L. R. 6 Bom. 490.

But where property attached in execution was sold privately after the attachment. their Lordships of the Privy Council said :—"There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution" (*Dinendro Nath Sandyal* v. *Ramkumar Ghosh*, L. R. 8 I. A. 65: 10 C. L. R. 281). See also *Anand Mayi Dasi* v. *Dharendro Chandro Mukharji*, 8 B. L. R. 122: 14 Moo. I. A. 101.

Recently, the Calcutta High Court has decided that a purchaser at an execution-sale is not as such the representative of the judgment-debtor so as to be estopped by the conduct of the latter (*Prabhu Lal* v. *Mylne*, I. L. R. 14 Calc. 401 *Bashi Chandra Sen* v. *Inayat Ali*, I. L. R. 20 Calc. 236); and in another case it has held that a purchaser at a public sale in execution of a decree is not, but a purchaser at a private sale is, the representative of the judgment-debtor (*Gaur Sundar Lahiri* v. *Hem Chandra Chaudhri*, I. L. R. 16 Calc. 355.

With reference to the third clause of this section, an admission may be provable on behalf of the person making it by being relevant (otherwise than as an admission) under section 6 or some one of the sections following it.

In addition to Illustrations (*d*) and (*e*), the following may also be given:—A sues B for falsely representing the solvency of C, in consequence of which A was induced to supply C with goods on credit. A statement made by A at the time, that he trusted C in consequence of B's representation, is admissible on behalf of A under *Explanation I*, section 8 (*Fellowes* v. *Williamson*, M. and M., 306. A, the captain of a ship about to sail on a voyage, carefully examines the ship, declares his belief that she is seaworthy, and embarks on her with his family and property uninsured. The ship is lost. In an action by the owners on a policy of insurance of the ship and cargo, it is pleaded that the ship was not seaworthy when leaving port. A's statement is admissible under clause 2, section 11, *ante*.

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is in entitled to give secondary

evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

For the rules regulating the admission of secondary evidence of documents, see section 65, *post*.

The rule here laid down is contrary to that propounded in *Slatterie* v. *Pooley* (6 M. & W. 669), in which it was decided that evidence of the parol admissions of a party as to the contents of a document is admissible "without notice to produce or accounting for the absence of the written instrument, on the ground that such evidence is not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true may reasonably presumed to be so." This decision was severely criticised. It was remarked that, according to the rule so laid down, what A states as to what B, a party, had said respecting the contents of a document which B has seen, is admissible, whilst what A states respecting a document which he himself has seen, is not admissible although in the latter case the chance of error is single; in the former, double. And in an Irish case (*Lawless* v. *Queale*, 8 Ir. Law Rep., 352) Pennefather, C. J. said:—"The doctrine laid down in that case is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged or had otherwise encumbered it: and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

Where a plaintiff sued for a sum said to be due upon a settlement of account, and, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the admission of the debt, their Lordships of the Privy Council said:—"They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one." *Sheopershad* v. *Juggernath*, L. R. 10 I. A. 70; 13 C. L. R. 271.

Admissions in civil cases when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

This section, as drafted in the original Bill, contained "infer that *it was the intention of the parties* that evidence of it should not be given," for "infer that the parties agreed together that," &c.

In the absence of any such express agreement, or implied condition, an offer of compromise will be *some* evidence of liability: but it must be borne in mind that such an offer may be made for the sake of purchasing peace, and without any admission of liability. Much depends upon the circumstances of each case.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Confessions are divided by English text writers into *extra-judicial*, or those made elsewhere than before a Magistrate or in Court; and *judicial*, or those made to a Magistrate or in Court in the due course of legal proceedings. *Extra-judicial confessions* embrace those made as well to private individuals, as to the officers of justice, such as constables, Police-officers, &c. If *voluntarily* made, they are receivable in evidence after being proved like other facts. With respect to a confession being voluntary, Chief Baron Eyre said:—"A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it."

Two kinds of confessions—Extra-Judicial and Judicial.

When the making of the confession appears to the Court to have been caused by any *inducement, threat* or *promise* proceeding from a *person in authority*, the confession must be rejected. According to English law any person having authority over the accused in connection with the prosecution, is a *person in authority* within the meaning of the rule. In *R.*

v. *Nauroji Dadábhái* (9 Bom. H. C. Rep. 358) Sargent, C. J., said :—

Who is a "person in authority."

"No definition or illustration is given of the expression 'person in authority.' It is an expression well known to English lawyers on questions of this nature; and although, as all rules of evidence, which which were in force at the passing of the Act, are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides." In this case the prisoner was a booking-clerk in the service of the Great Indian Peninsula Railway; and the person by whom the inducement, threat or promise was held out, had been previously a travelling auditor of the Company and was at the time engaged in special duty, in the course of which he discovered the defalcations in the accounts in respect of which the charges were made. He was held to be a *person in authority* within the meaning of the above section. The learned Chief Justice said :—"He would clearly be so, I think, according to English authorities. The test would seem to be—had the person authority to interfere with the matter?—and any concern or interest in it would appear to be held sufficient to give him that authority, as in *The Queen* v. *Warringham* (2 Den. C. C. 447*n*), where Parke, B., held that the wife of one of the prosecutors, and concerned in the management of their business, was a person in authority; and we find the rule so laid down in Archbold's Criminal Practice." The members of a *panchayat*, which sat to consider whether two persons should be excommunicated from caste for having committed a murder, were held not to be 'in authority' within the meaning of the section (*Empress* v. *Mohan Lal*, I. L. R. 4 All. 46). Under English law, the following have been held to be *persons in authority*, within the meaning of the rule :—the prosecutor; the master or mistress of the prisoner, when the offence concerned such master or mistress; the constable or other officer having the prisoner in charge; a Magistrate. The master or mistress of a prisoner is not a person in authority, if the offence of which the prisoner is accused was not committed against them. For example, where a servant was accused of the murder of her child, and her mistress held out to her an inducement to confess, the confession was held admissible (*R.* v. *Moore*, 3 C. and K. 153).

According to the English authorities, the rule holds good if the inducement, though not actually offered by the person in authority, be held out by any one *in his presence*, and he by his silence seems to sanction its being made. This appears not to be the law under the above section, according to which the inducement, threat or promise must be one *proceeding from* a person in authority.

Inducement from person having no authority.

Whether an inducement, threat or promise proceeding from a person having *no authority* renders a confession inadmissible, is a question upon which the English decisions have not been uniform. The weight of authority appears to be in favour of the admissibility of such a confession. That it would be admissible under the above section, there appears to be

little doubt, as the confession is declared to be irrelevant only when made in consequence of an inducement, threat or promise proceeding from a person in authority.

Inducement must have reference to charge.

The inducement, threat or promise must *have reference to the charge against the accused person;* and, if made as to one charge, will not affect a confession as to a totally different charge. A promise of some collateral boon or benefit, as, for example, to give him some spirits (*R.* v. *Sexton*, 3 Russ. C. and M. 368), to take off his handcuffs (*R.* v. *Green*, 6 C. and P. 365), to let him see his wife (*R.* v. *Lloyd*, 6 C and P. 393), will not be a bar to the admissibility of the confession.

Inducement must be sufficient, &c.

The inducement, threat or promise must be sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that, by making the confession, he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. It is for the Court,—that is, the Judge of Magistrate,—to form an opinion whether the inducement, threat, or promise was, under the circumstances, sufficient to afford reasonable grounds for supposing this. In cases tried with juries the admissibility of a confession is to be determined by the Judge alone. The advantage to be gained or the evil to be avoided must (1) be of a temporal nature; and (2) must have reference to the proceedings againt the accused. Thus, where the Goal Chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done, and the prisoner after this made two confessions to the gaoler and the mayor, these confessions were held to be admissible (*R.* v. *Gilham*, 1 M. C. C. 186). Again, when a man said to a boy charged with murder:—"Now kneel you down. I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty"—and the boy made a statement; it was held to be strictly admissible (*R.* v. *Wild*, 1 M. C. C. 452).

Relevancy of confession to be determined by Court.

The confession will be irrelevant if the making of it appears to the Court to have been caused by any inducement, threat, or promise, &c. Here again it is for the Court,—that is, the Judge (not the Jury) or the Magistrate,—to determine whether, under the circumstances, the confession is to be admitted. In *R.* v. *Navroji Dádábhái* (9 Bom. H. C. Rep. 367) Sargent, C. J., said:—"Section 24 leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing." In *R.* v. *Balvant Pendharkar* (11 Bom. H. C. Rep. 138) it was also said, that a statement is inadmissible only if the Court considers it to have been made in consequence of any inducement, threat or promise. In this case the

accused for the first time before the Court of Session alleged that the confession was the result of threats and hopes held out to him. There was, however no evidence of this, and the High Court were of opinion that, in the absence of evidence it was not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure was inadmissible. As to the practice in England, which may be useful as a guide, Mr. Roscoe says:—"For the purpose of introducing a confession, it is unnecessary, in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place." In *R.* v. *Williams* (2 Rus. by Greaves, 870) Taunton, J., said:—"A confession is presumed to be voluntary unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J., he added:—"We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable *may have induced* the prisoner to make the statement, otherwise we must in all cases call the Magistrates and constables before whom or in whose custody the prisoner has been." In the previous case of *R.* v. *Swatkins* (4 C. & P. 548) the witness called to prove the confession went into a room in an inn and found the prisoner in charge of a constable. The prisoner motioned the constable to leave the room, which he did, and left them alone. The prisoner then made a statement. It was contended that the constable ought to be called to show that he had used no inducement to make the prisoner confess. Patteson, J. said:—"I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away." In *R.* v. *Warringham* (2 Den. C. C. 447*n*) it was decided that, in order to render a confession admissible, the prosecution must show affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement; and that, if this appears doubtful on the evidence, the confession ought to be rejected. The decisions in England are thus not uniform. It may however be observed that, in *R.* v. *Swatkins*, the witness to whom the confession was made was a constable; while in *R.* v. *Williams* the witness was not a constable. In India, a confession made to a constable is wholly inadmissible. When a confession has been received, and it afterwards appears from other evidence that an inducement, threat or promise was held out, the proper course for the Judge is to strike the confession out of the record and tell the Jury to pay no attention to it (*R.* v. *Garner*, 1 Den. C. C. 329).

Is preliminary evidence necessary to negative inducement, &c.?

It will be useful to give some instances of confessions admitted and rejected. The following have been held to be admissible:—Two children, charged with attempting to obstruct a railway train, confessed after they had been apprehended, the mother of one of them having said to them in the

Confessions held admissible.

presence of a Police-man:[5]—"You had better as good boys tell the truth" (*Queen* v. *Reeve* and *Hancock*, 1 C. C. 362):—The prisoner made a statement after he had been called up by his master, who said:—"You are in the presence of two Police-Officers; and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue:"[5] the master afterwards said:—"Take care; we know more than you think" (*Queen* v. *Jarvis*, 1 C. C. 96). A maid-servant, taken into custody on a charge of setting fire to her master's premises, was allowed to go with her master's daughter to change her clothes: the master's daughter asked her to tell the truth whether she did it or not: she said:—"I am innocent:" the master's daughter replied:—"Don't run your soul into more sin"—and the servant made a full confession—*R.* v. *Sleeman*, 17 Jur. 1082).

Confessions held inadmissible.

The following have been held to be inadmissible:—When the prisoner had been told that he had better pay the money than go to gaol, and that it would be better for him to tell the truth (*R.* v. *Navroji Dádábhái*, 9 Bom. H. C. Rep. 369)—"unless you give me a more satisfactory account I will take you before a Magistrate" (*R.* v. *Thompson*, 1 Lea. 291)—"if you will tell me where my goods are, I will be favourable to you" (*R.* v. *Cass*, 1 Lea. 293)—"the watch has been found, and if you do not tell me who your partner was, I will commit you to prison" (*R.* v. *Parratt*, 4 C. and P. 570)—"you had better split and not suffer for all of them" (*R.* v. *Thomas*, 6 C. and P. 353)—and, "I only want my money, and if you give me that, you may go to the devil" (*R.* v. *Jones*, R. and R. 152)—when the accused, a sailor, had been threatened by the captain with a loaded rifle and had then surrendered and been placed in irons (*Queen* v. *Hicks*, 10 B. L. R. App. 1)[6]—when the prosecutor said to the prisoner in the presence of a Police-Officer:—"The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you" (*Reg.* v. *Fennell*, L. R. 7 Q. B. D. 147). When a prisoner confessed, knowing that a reward and a pardon had been offered to any but the actual perpetrator of the offence, and under circumstances which led to the belief that his statements were made with the hope of receiving the reward, and being allowed to give evidence as a witness on the part of the Crown, his statements were held inadmissible (*Reg.* v. *Blackburn*, 6 Cox C. C. 333). But the mere knowledge of such a reward and promise of pardon was held not to render the confession inadmissible, when it did not appear that the inducement thus held out had led the prisoner to confess (*Reg.* v. *Boswell*, Car. and M. 584: *Reg.* v. *Dingley*, 1 C. and K. 637). In the case of *Queen* v. *Radhanath Dosadh* (8 W. R. Cr. 53) the prisoner had make a statement under promise of pardon, and had then escaped from custody. He was subsequently arrested, and it was held that

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[5] In India these would be inadmissible—see section 26, *post*.
[6] The correctness of this ruling seems doubtful.

on his trial this statement could not be given in evidence against him. In *Queen* v. *Dharom Dutt Ojha*, 8 W. R. Cr. 13, a Police-Officer deposed:—"The prisoners were told by me that I would get them released if they would speak the truth." Their confessions were therefore held inadmissible. In the case of *Bisu Manjhi*, 9 W. R. Cr. 16, an admission made by the accused was rejected, because it appeared to have been obtained by a Police-Officer by persuasion and promises of immunity. In *Queen Empress* v. *Uzir*, I. L. R., 10 Calc. 775, a Deputy Magistrate prefaced a confession with the following note:—After excluding from my presence the Police-Officer who brought him, I warned the accused that what he would say would go as evidence against him; so he had better tell the truth." It was held that in consequence of this inducement having been held out to the prisoners the confession must be rejected."

Confession made under promise of pardon when admissible.

When under the provisions of the Code of Criminal Procedure a pardon is tendered to an accused person, but is withdrawn, because the person who accepted such pardon has not conformed to the conditions under which it was tendered, either by wilfully concealing anything essential or by giving false evidence, the statement made by such person under pardon may be given in evidence against him (section 339).

But when the tender of pardon was held not to be warranted, because the case was one relating to an offence not triable exclusively by the Court of Sessions, it was held that a statement made by the person who had accepted the pardon was irrelevant and inadmissible as a confession; *Empress of India* v. *Ashgar Ali*, I. L. R. 2 All. 260.—*Reg.* v. *Hanmanta*, I. L. R. 1 Bom. 610). The confession of a prisoner in one case in which he was convicted cannot be used against him in another case, unless it is deposed to on oath either by the person who took it down or by some one else who heard it: (*In the proceedings in the case of Mangar Bhuyah*, 10 W. R. Cr. 56; *Queen-Empress* v. *Durga Sonar*, I. L. R. 11 Calc. 580).

Confession to a Police-officer not to be proved.

25. No confession made to a Police-officer[7] shall be proved as against a person accused of any offence.

Confessions to Police officers by made inadmissible in India.

The reasons which influenced the Legislature in excluding a confession made to a police-officer, or while in the custody of the Police (see the following section) will appear from the following extract from the *First Report of the Indian Law Commissioners*.—"The Police in the provinces of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but complaints

[7] In Upper Burmah, after the word "Police officer," the words "who is not a Magistrate" are to be inserted. See Act XX of 1886, section 7 (1) (d).

in cases of the more serious offences are usually laid before the Police darogah, who is authorised to examine the complainant, to issue process of arrest, to summons witnesses, to examine the accused and to forward the case to the Magistrate, or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs during the sessions of 1852 and 1853, and other papers, which have been brought to our notice, abundantly show that the powers of the Police are often abused for purposes of extortion and oppression, and we have considered whether the powers now exercised by the Police might not be greatly abridged. We have arrived at the conclusion that, considering the extensive jurisdiction of the Magistrate, the facilities which exist for the escape of parties concerned in serious crimes, and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it is requisite to arm the Police with some such powers as they now possess; and we have accordingly adopted many of the provisions of the Bengal Code on this head. *In one material point we propose a change in the duties of the Police.* By the existing law, the darogah or other Police-officer presiding at an inquiry into a crime committed within his division is required, upon the apprehension of the accused, to 'question him fully regarding the whole of the circumstances of the case and the persons concerned in the commission of the crime, and if any property may have been stolen or plundered, the person in possession of such property, or the place where it has been deposited. In the event of the accused making free and voluntary confession it is to be immediately written down.' Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, in spite of this qualification as to the character of the confession, *confessions are frequently extorted or fabricated.* A Police-officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions; and, when this step is once taken, there is of course impunity for the real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, who, as far as the Police are concerned, are now perfectly safe. We are persuaded that any provisions to correct the exercise of this power by the Police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule *prohibiting any examination whatever of an accused party by the Police, the result of which is to constitute a written document.* This, of course, will not prevent a Police-officer from receiving any information which any one may voluntarily offer to him; but the

Police will not be permitted to put upon record any statement made by a party accused of an offence."

The above section alters the law as laid down in the case of *Queen* v. *Nabadwip Goswami* (1 B. L. R. O. S. Cr. 15) tried on the Original Side of the Calcutta High Court, in which it was held that what the prisoner said in answer to questions put to him by a Police-officer was admissible, no threat having been used or false hope held out. Now, no confession made to any Police-officer is admissible in evidence, except as provided by section 27. The section is not to be read merely as if it ran "no confession made to a Police-officer investigating a case shall be proved against an accused;" *In the matter of Haran Miya*, 1 C. L. R. 21.

In *The Queen* v. *Haribol Chandra Ghosh*, I. L. R. 1 Calc. 207: 25 W. R. Cr. 36; it was held that the Deputy Commissioner of Police in Calcutta is a *Police-officer* within the meaning of the section. "I consider," said Garth, C. J., "that the term 'Police-officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning."

Whether there is any distinction between admissions and confessions made to a police officer.

Where the accused person was sent for and shown a certain cheque by a Police officer, whereupon he said that one K had given him this cheque, and it was sought to use this statement as evidence of his possession of the cheque, it was held that the statement, though made in self-exculpation, and not as a confession, yet being an admission of a criminating circumstance upon which the prosecution relied, could not be given in evidence (*Imperatrix* v. *Pandhari Nath*, I. L. R. 6 Bom. 34). A different view has been taken by some Judges of the Calcutta High Court. In *The Queen* v. *Macdonald* (10 B. L. R. App. 2) the prosecutor's watch, chain and a sum of money had been stolen from him as he was travelling by rail to Calcutta. Evidence was tendered of a statement made by the prisoner to the constable who arrested him, to the effect that the watch and Rs. 1,000 had been given to him by his master, and that he had bought the chain. Phear, J., admitted this evidence, observing that there is a distinction in the Act between *admissions* and *confessions*. This case was followed by Prinsep, J., in the *Empress* v. *Dabi Prasad*, I. L. R. 6 Calc. 539: 7 C. L. R. 541, in which it was held that an admission made by an accused to a Police-officer before arrest was admissible in evidence. But in *Queen-Empress* v. *Mathews*, I. L. R. 10 Calc. 1022, a Police-officer in the course of cross-examination said: "The prisoner, when I arrested him said: 'Some Chinamen at the time of the occurrence came out with hatchets.'" In re-examination by the Standing Counsel, the witness substituted the words "at the time" for the words, "at the time of the occurrence," and on being asked, "What time?" said: "He said 'at the time I struck the deceased.' The Counsel for the defence objected to this, and it was held that this evidence could not be given. Again, in *Queen-Empress* v. *Meher Ali Mallik and two others* (I. L. R. 15 Calc. 589), the prosecution sought

to prove that one of the accused had made certain statements to a Police-officer. The statements were the following, and made under the following circumstances: "A Superintendent of Police, during the course of his evidence, stated that, on going to the godown where the murder was alleged to have been committed, he saw the accused Torab there, and he asked him if he had seen the deceased Hari there the previous day. Upon his being asked what Torab said, Counsel for the defence objected; the objection was overruled, and the witness stated: 'Torab remained silent, and on my repeating the question he said Hari had come the previous day at noon to the premises, but that he did not know when he left.' The witness then proceeded to state that he went with others into a godown, and on telling Torab to empty his box, Torab produced a Bengali bill and made a statement. Counsel for the defence again objected to evidence of this statement being given. The statement sought to be proved was to the following effect: 'Sir, I have something to give you. Meher Ali (another accused) gave me this paper yesterday evening to keep for him.' Upon the objection being taken the question was not allowed, and the question of the admissibility of the evidence was reserved. At a later stage of his examination, the witness stated that, after producing the bill, Torab made another statement, and he was asked what that statement was. The statement, as recorded in the deposition of this witness taken before the Magistrate, upon which he was being examined, was as follows:—Torab said: 'Hari came here yesterday at 1 P.M. Hari and I and Bhatto and Meher Ali were seated in this room, looking over his account, when Hari took sick with cholera. He went out of the room three times to ease himself, and came back and sat down, when angry words passed between him and Meher Ali. He also made a further statement.' Counsel for the defence again objected to this statement, and stated that it was clear that the whole of Torab's statement was not then given, and referred to the deposition of this witness before the Coroner, when the same statement was more fully recorded, and contended that if a portion of the statement was to be admitted, the whole must be admitted. Subsequently, the Counsel for the defence stated that the statement made by Torab at the time of giving the paper to the witness was innocuous. He therefore withdrew his objection to it. After the jury had withdrawn, the Standing Counsel argued that the statements made by Torab were admissible in evidence, as he was not then under arrest, and that they were not confessions but were admissions. The Counsel for the defence in reply contended that it was immaterial whether the accused was under arrest or not, that the statements were virtually confessions, and that the Evidence Act made no distinction between admissions and confessions. Wilson, J., after taking time to consider the question observed: 'I have come to the conclusion that evidence can be given as to what Torab said when he made over the paper to the Police, but that evidence of the other statements sought to be proved cannot be given.'" From these rulings it would seem doubtful whether *Queen* v. *Macdonald* and *Empress* v. *Debi Prasad* should now be followed.

Confessions made to a Police-officer admissible for other purposes

Though a confession made to a Police-officer may not be proved as against a person accused of an offence, it may yet be proved for other purposes. Thus, in *Imperatrix* v. *Pitamber Jina* (I. L. R. 2 Bom. 61), it was said that section 25 of the Evidence Act does not preclude the counsel for one accused asking on behalf of his client questions to prove a confession made by another accused person. But under such circumstances, it was said, it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other.

In *Queen-Empress* v. *Tribhovan Manikchand* (I. L. R. 9 Bom. 131), it was held that statements made by accused persons as to the ownership of property which is the subject-matter of the proceedings against them were admissible as evidence with regard to the ownership of the property in an enquiry held by the Magistrate under section 523, Act X of 1882. In this case West, J., observed: "Confession in section 25 of the Indian Evidence Act I of 1872, means, as in section 24, a confession made by an accused person, which it is proposed to prove against him to establish an offence. For such a purpose a confession might be inadmissible, which yet for other purposes would be admissible as an admission under section 18 against the person who made it (section 21) in his character of one setting up an interest in property, the object of litigation or judicial enquiry and disposal."

A Village Munsiff in Madras is a Police officer

A Village Munsiff in the Madras Presidency, though under the Village Cess Act (Madras Act IV of 1864), he is employed on police duties, is not a Police-officer within the meaning of this section: *Queen-Empress* v. *Sami Papi* (I. L. R. 7 Mad. 287). But he is not a Magistrate, unless he exercises the powers of a Magistrate under the Code of Criminal Procedure (see the explanation to section 26).

Confession by accused while in custody of police, not to be proved against him.

26. No confession made by any person whilst he is in the custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.—In this section 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burmah or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.[8]

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[8] The Explanation to this section was added by section 3, Act III of 1891. It alters the law as laid down by the Madras High Court in *Empress* v. *Ramanjiyya* (I. L. R. 2 Mad. 5).

Under the provisions of section 25 a confession made *to a Police-officer* is absolutely inadmissible. It is inadmissible even if made in the presence of a Magistrate *Queen* v. *Doman Kahar*, 12 W. R. Cr. 82. Under the provisions of section 26 a confession made by a person, *whilst he is in the custody of the police*, is inadmissible, unless it be made in the immediate presence of a Magistrate. A confession made to a person other than a Police-officer by a person in the custody of the police is thus admissible, if made in the immediate presence of a Magistrate · *Queen-Empress* v. *Nil Madhab Mitra* (I. L. R. 15 Calc. 607).

In one case it has been said that the evidence of a policeman who overheard a prisoner's statements made in another room in ignorance of the policeman's vicinity, and uninfluenced by it, is legally admissible in evidence. *R.* v. *Sagina* (7 W. R. Cr. 56).

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 150 of the old Code of Criminal Procedure, Act XXV of 1861, ran thus—"Deposed to *by a Police-officer*," &c. The words in *italics* were omitted in the amended section substituted by Act VIII of 1869; and the omission has been here retained. As the section now stands, the fact may be deposed to by any one.

The words "*in the custody of a Police-officer*" might seem to indicate that this section was intended to be a proviso to section 26 only; and that it does not apply when the information, relating to the fact discovered thereby, constitutes a confession *made to a Police-officer*. It has, however, been decided by a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Babu Lal*, I. L. R. 6 All. 509, that this section is a proviso not only to section 26 but also to section 25, and that, therefore, so much of the information given by an accused to a Police-officer, whether amounting to a confession or not, as distinctly relates to the facts thereby discovered, may be proved.

This section a proviso to section 25 as well as to section 26

How much of information may be proved.

An important question, which arises under this section, is as to how much of the information given by the accused may be proved, and what interpretation is to be put on the words "as relates distinctly to the fact thereby discovered." In the case of *Reg.* v. *Jorá Hasji* (11 Bom. H. C. Rep. 242) West, J., said :—"It is not all statements connected with the

production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. . . . . A man says —'you will find a stick at such and such a place. I killed Rámá with it.' A policeman in such a case may be allowed to say he went to the place indicated and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find,' the prisoner has said, 'I placed a sword or knife in such a spot,' where it was found; that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. . . . . If under cover of explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. The giving up by a cultivator of a billhook, or the pointing out of a place where *bajri* appears to have been trampled, is however in itself an unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion (where it is excluded) is not prevented by its being connected with matters that are not excluded." See also *Empress* v. *Rama Birápa*, I. L. R. 3 Bom. 17: and *Empress* v. *Pancham*, I. L. R. 4 All. 198. In *Queen* v. *Pagari Shaha* (19 W. R. Cr. 51) the accused had stated to the Sub-Inspector that he had seized deceased by the neck, and pushed her forcibly down so that she fell against a plantain tree and broke her neck; that he also struck her with his hand; that the woman then and there died; and that he then, after endeavouring to remove the body, took off from it a necklace and pair of bracelets which he concealed in the neighbouring *jangal*. In consequence of this information he was taken to the *jangal* pointed out by him, and he then produced from a concealed place the necklace and bracelets, saying that they were the ornaments which he had removed from the body of the deceased. Glover, J., thought that the portions of the information which described the assault on the deceased and her consequent death related distinctly to the fact of the discovery of the ornaments, which discovery was made in consequence of that information; and that the prisoner's admission as to the way in which he became possessed of those ornaments was a fact which the Law of Evidence allowed to be proved against him. But this view has been dissented from in later cases. In *Queen* v. *Ram Charan Chang* (24 W. R. Cr. 36) Jackson, J., commented "upon a prevailing tendency to disregard the provisions of section 26 and to have recourse, although not justified by facts, to the proviso contained in section 27." In *Adu Shikdar* v. *Queen-Empress*, I. L. R. 11 Calc. 635, the Calcutta High Court has laid down the rule that

"no judicial officer should allow one word more to be deposed to by the Police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence." This was followed by the Madras High Court in *Queen-Empress* v. *Commer Sahib*, I. L. R. 12 Mad. 153, in which it was said that "the reasonable construction of section 27 is that in addition to the fact discovered so much of the information as was the immediate cause of the discovery is legal evidence."

In *Empress* v. *Pancham*, I. L. R. 4 All. 198, in which the accused took the police to a certain spot and pointed out where certain anklets were lying, it was observed by Straight, J., that it was by the accused's own act and not from any information given by him that the discovery of these anklets took place. His Lordship seems to have meant that in such a case the provisions of section 27 were not applicable. The Bombay High Court in *Queen Empress* v. *Kamalia*, I. L. R. 10 Bom. 595, came to the same conclusion. In this case the prisoners produced some grain and admitted before the police that they had stolen it. The Court said :—"We may observe, following Straight, J., in *Empress of India* v. *Pancham*, that as the prisoners themselves produced the *jwari*, it was by their own act, and not from any information given by them that the discovery took place. That case is also an authority for holding in the same circumstances that the production of the property may be proved, but not the accompanying confession made to the police." This opinion was, however, dissented from by a Full Bench of the same Court : *Queen-Empress* v. *Nana*, I. L. R. 14 Bom. 260.—In this case certain persons were arrested on a charge of theft. They admitted the theft to the police, and stated that they had handed over the stolen property to one Nana. On being sent for, and questioned about the stolen property, Nana said : "Yes, I have kept it. I will point it out. I have buried it in the fields." He then took the police to the spot where the property was concealed, said that he had buried it there, and with his own hand disinterred an earthen pot in which the property was kept. Sargent, C. J., with reference to the argument that section 27 was not applicable, as the property had not been discovered in consequence of the information given by the accused to the police, but by the act of the accused himself on the spot, in support of which argument *Queen-Empress* v. *Kamalia* and *Empress* v. *Pancham* were cited, observed : "It is clear, however, that it was upon the information which the statement gave the police that they accompanied him to the spot where the earthen pot was disinterred by the accused, containing the property, and it is equally clear that if it had not been for this information, the property would not have been discovered; and it is, therefore, in accordance with the ordinary use of such terms to say that the discovery of the property in this case was

the consequence of this information. It set the police in motion, the immediate consequence being that the police asked the accused to show them the spot, and accompanied him there; but such a proceeding on the part of the police was with the view to the discovery of the property, and was the natural consequence of the information they had received from him, and so connected it with the final result, *viz.*, the discovery of the property, as a *causa causans*. . . . . Whether the statement made by the accused is of such a detailed description as to enable the police themselves to discover the property, or only of such a nature as to require his assistance in discovering the exact spot where the property is, cannot in our opinion affect the question. In both cases there is the guarantee afforded by the discovery of the property for the correctness of the accused's statement, and which is presumably the ground for the admission of the exception to the general rule. See Taylor on Evidence, section 824. The distinction sought to be drawn appears to us, therefore, to be without substance. But it remains to consider whether the whole statement was admissible in evidence, and as to this there would appear to be little or no difference in the views of the several High Courts. 'So much of the information as distinctly led to the discovery of the property may be admitted' is the ruling of this Court in *Reg.* v. *Jorá Hasji* after a full consideration of the section, and which, we believe, has always been acted upon in this Court.' . . . . . There the statement by the accused that he had buried the property in the fields distinctly set the police in motion and led to the discovery of the property. But the statement that he had kept the property is not necessarily connected with the fact discovered and was, therefore, in our opinion not admissible."

In connection with this subject, the following question may be asked—if a confession (not made to a Police-officer or by a person in the custody of the police) be inadmissible under section 24 in consequence of an inducement, threat or promise; but if some fact be discovered in consequence of such confession, will so much of the confession as relates distinctly to such fact thereby discovered be admissible? The rule under English law is, that although a confession may be inadmissible in consequence of an inducement having been offered, yet *any discovery that takes place in consequence of such confession or any act done by the accused, if it be confirmed by the finding of the property*, will be admitted. "Where," says Mr. Taylor, "in consequence of information *accidently obtained* from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found

Fact discovered by a confession, which is inadmissible owing to inducement, &c.

by searching a particular place, and that it was accordingly so found; but it would not be competent to enquire whether he confessed that he had concealed it there. Lord Eldon has laid down the rule somewhat more strictly, saying, in *Harvey's case*, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be, that *so much of the confession as relates distinctly to the fact discovered by it may be given in evidence*, as this part at least of the statement cannot have been false. If the prisoner himself delivers up the goods stolen, the fact that this was done upon inducements to confess, held out by persons in authority, will afford no ground for rejecting his declarations contemporaneous with the act of delivery and explanatory of its object, though they may amount to a confession of guilt. But whatever he may have said at the same time, *not qualifying or explaining the act of delivery*, must be rejected. And if, notwithstanding the prisoner's confession thus improperly induced, and any acts done by him in furtherance of the discovery, the search for the property or person in question is ineffectual, no proof of either the confession or the acts can be received." (§§ 824—825: §§ 902, 903, 8th edn.) As to statements accompanying and explaining the act of delivering up property, see Explanation I, section 8, *ante*.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise, has, in the opinion of the Court, been fully removed, it is relevant.

It is for the Court to decide whether the improper influence was totally done away before the confession was made. In this, as well as other respects, the admissibility of the confession is a question for the Judge. It constantly occurs that an accused person is brought in by the police, and, being taken at once before a Magistrate, makes a confession, which afterwards at the Sessions he declares to have been made in consequence of threats, promises, or ill-usages by the police. There is too much reason to believe that this statement is not always without foundation. Though the law does not require it, a Magistrate might well, when an accused is brought in by the police ready to confess, give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to him. A Magistrate can never know whether the police have threatened or promised; but by taking the above course should a threat or promise have been used, he will generally be able to remove the impression caused thereby, and a confession then made will scarcely be open to possible objection.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

The following is an instance of a confession made under a promise of secrecy. A a fellow-prisoner, said to B, who was in custody for murder—"I wish you would tell me how you murdered the boy, pray split." B replied—"Will you be on your oath not to mention what I tell you." A promised on his oath and then B made a confession, which was held admissible—*R.* v. *Shaw*, 6 C. & P. 372.

Promise of secrecy

The following are instances of confessions obtained by deception: The turnkey of a gaol promised to post a letter for a prisoner; but instead of doing so, sent it to the prosecutor. It contained matter amounting to a confession, which was held admissible—*R.* v. *Derrington*, 2 C. & P. 418. The prisoner confessed, being led to believe that an accomplice was in custody, which was not the case—*R.* v. *Bailey*, 1 Phil. Ev. 104. See also *Queen* v. *Ram Charan Ghosh*, 20 W. R. Cr. 33.

Deception.

A confession made by a prisoner when drunk is none the less admissible, because the liquor was given him to make him intoxicated in the hope that he would make disclosures while in that state—*R.* v. *Spilsbury*, 7 C. & P. 187.

Drunk

In *R.* v. *Ellis* (R. & M. 432) a confession elicited by questions put by a Magistrate was held admissible in England. In India, the law expressly provides for the examination of the accused person by the Magistrate. When the confession is contained in an answer given by a witness to a question put to him in the witness-box, the provisions contained in section 132, *post*, must be borne in mind. A confession made by a prisoner in a private conversation, which was overheard, has been held to be admissible—*R.* v. *Simons*, 6 C. & P. 541: *R.* v. *Sagina*, 7 W. R. Cr. 56.

Questioning

The law or practice outside the Presidency towns in India never required that an accused person should be warned that he is not bound to make a confession. In the Presidency towns and in the case of European British subjects, the question

Accused need not be warned

of this pre-requisite to the admissibility of a confession was not altogether settled. The matter was discussed in the case of *Queen* v. *Nabadwip Chandra Goswami* (1 B. L. R. O. Cr. 15), in which the accused was tried for an offence committed in Calcutta. He was arrested and taken before a Mufassal Magistrate. His statements made in answer to questions put by this Magistrate, who had not warned him, were held admissible. The Evidence Act has on this point practically followed this decision, and its provisions are applicable to the Presidency-towns and to European British-born subjects.

In *Queen-Empress* v. *Uzir*, I. L. R. 10 Calc. 775, the Court said :—"We may observe that it is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him."

The Criminal Procedure Code too (section 163) expressly provides that no Police-officer or other person shall prevent by any caution or otherwise any person from making in the course of an investigation under this chapter (*i.e.* Chapter XIV, Act X of 1882) any statement which he may be disposed to make of his own free will.

Whether extra-judicial confessions, if uncorroborated, are sufficient for conviction.

As to the *effect of extra-judicial confessions*—are they, if uncorroborated, sufficient for conviction? This subject has been much discussed. Mr. Greaves, in a note to *Russell on Crimes*, is of opinion that it never has been expressly decided that the mere confession of a prisoner alone without other evidence is sufficient to warrant a conviction. In all the English reported cases some corroborating circumstance is to be found—(see *R.* v. *Eldridge*, R. & R. C. C 440; *R.* v. *White*, *id.* 508; *R.* v. *Tippet*, *id.* 509; *R.* v. *Faikner and Bond*, *id.* 481). "In the United States," says Mr. Taylor, "the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover, it seems countenanced by approved writers on this branch of the law." § 724 § 868, 8th edn. On this point, as on others concerning the *weight* to be assigned to evidence, the Evidence Act leaves the discretion of the Courts unfettered. In a case decided before the Act came into operation, the Calcutta High Court made the following observations :—"The confession of Bechú is conclusive evidence against him, if it be believed. . . . . I do not quite understand why the Sessions Judge told the jury that the confession was evidence, but was not absolutely conclusive. The question for consideration was, whether the confession was voluntary and genuine; and, if no reasonable doubt arose on these points, the confession was legal and sufficient proof of guilt"—*Queen* v. *Jhari*, 7 W. R. Cr. 41. If the bare confession of a prisoner be held sufficient for conviction, it ought to be clear and direct, and not by implication merely. The actual words spoken by the prisoner should always be given in detail. The witness's impression of what they meant is not sufficient. In *Queen* v. *Subjan* (10 B. L. R. 335) Phear, J., observed :—"Halal says 'she confessed,'

but it is all important in matters of this kind to know what were the words which the person who is said to have confessed actually used; nothing short of the actual words given in detail in the first person, so far as it is possible to obtain them, ought ever to be relied on as a foundation for the opinion formed by the Court; because it may turn out that the words, taken together with the questions and the circumstances under which the questions were put, do not in truth amount to a confession of guilt such as the witness chose to represent it."

Effect of judicial confessions.

With regard to judicial confessions it has been said that the properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court: *Queen* v. *Bhattan Rajwan*, 12 W. R. Cr. 49: *R.* v. *Balvant Pendharkar*, 11 Bom. H. C. Rep. 137. In another case, however, *Safarudin* v. *Empress*, 2 C. L. R. 132, in which the prisoners had confessed before the Magistrate, but had retracted their confessions before the Sessions Courts, it was said that as it appeared that the police had misconducted themselves and produced evidence with regard to the identification of property which was false, it would not be safe to act upon the confessions without any corroboration at all. According to the Madras High Court, a retracted confession must be supported by independent reliable evidence corroborating it in material particulars: *Queen-Empress* v. *Rangi*, I. L. R. 10 Mad. 295, and *Queen-Empress* v. *Bharmappa*, I. L. R. 12 Mad. 123. In *Queen* v. *Kristo Mandal*, 7 W. R Cr. 8, the prisoners during the preliminary investigation stated that the crime was committed by other persons and that any share they had in it was under compulsion. Such a confession, it was said, contained an important admission, but it was not an admission of guilt, and upon such a confession alone no person ought to be convicted.

The whole of a confession to be taken together.

It is a general rule that the whole of the confession must be given in evidence and taken together. "The prisoner," said Abbott, C. J., "is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As the meaning of a writing must in civil cases be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties; so here, if one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation, or at least so much as is explanatory of the part already proved, and perhaps, *in favorem vitae*, all that was relative to the subject-matter in issue"—*The Queen's Case*, 2 Brod. & Bingh. 297. "There is no doubt," said Bosanquet, J., in *R.* v. *Jones* (2 C. & P. 629), "that, if a prosecutor uses the

declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and, if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury, but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.[9] When a prisoner charged with murder stated that he was present when the murder was committed, but took no part in committing it, Littledale, J., told the jury that this statement must be taken all together and was evidence for the prisoner as well as against him; still that they might, if they thought proper, believe one part of it and disbelieve another—*R.* v. *Clewes*, 4 C. & P. 225. So where a prisoner, charged with the theft of cloth, said that it was honestly bought and paid for, Parke, J., told the jury that, if they believed that he really bought and paid for the cloth, as he said, they ought to acquit him; but if, from his selling it very soon after it was lost, at the distance of eight miles, they felt satisfied that the statement of his buying it was all false, they would find him guilty. The following cases, decided by the Calcutta High Court before the Evidence Act came into operation, may be referred to—*Queen* v. *Chakû Khan*, 5 W. R. Cr. 70: *Queen* v. *Budhû*, 8 W. R. Cr. 38: *Queen* v. *Bishû-Manjhi*, 9 W. R. Cr. 16: *Golak Chandra Chaudhri* v. *The Collector of Chittagong*, 25 W. R. 15. In *Queen* v. *Sabjan*, 10 B. L. R. 332, the accused had made two statements, the one amounting to a confession of guilt, and the other repudiating it. Phear, J., in this case said: "If the one statement is to be taken against the prisoner, the other ought also to be taken for as much as it is worth in her favour, and that in such a case it was especially incumbent to weigh well the relative credibility of these two statements before it takes one in preference to the other." See also *Queen* v. *Nitya Gopal Das Bairagi*, 24 W. R. Cr. 80.

Formalities to be observed in recording confessions.

Confessions of accused persons recorded by Magistrates are admissible in evidence subject to the provisions of sections 164 and 364 of the Criminal Procedure Code. The first of these sections provides that any Magistrate may record a confession made to him, while a case is under

[9] Taylor § 795: § 871, 8th edn. and cases there cited.

investigation by the police, or at any time afterwards before the commencement of the enquiry preliminary to committal to the Court of Sessions or trial. Such confessions must be recorded and signed in the manner provided in section 364, and a certificate must be appended to the effect that in the Magistrate's belief they were made voluntarily. Section 364 provides that the whole examination including every question and answer shall be recorded in full in the language in which the accused is examined, or, if that is not practicable, in the language of the Court or English, that the record shall be shown or read over to the accused and shall be signed by him and by the Magistrate, and a certificate appended that the record contains a full and true account of the statement made by the accused. A memorandum of the substance of the accused's statement must be made by the Magistrate himself. But section 364 does not apply to cases tried summarily in which no appeal lies. Another section of the Criminal Procedure Code (section 533) further provides that when a statement or confession of an accused is tendered in evidence, and the provisions of sections 164 or 364 have not been fully complied with, the Court shall take evidence that such person duly made the statement recorded; and notwithstanding anything contained in section 91 of the Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits. There are numerous rulings to the effect that the Magistrate referred in section 164 is a Magistrate other than the Magistrate who has jurisdiction in the case: *Queen* v. *Jitu*, 23 W. R. 16: *In the matter of Bihari Haji*, 5 C. L. R. 238. If the confession be made before a Magistrate who has jurisdiction to deal with the matter to which it relates, it is sufficient if the provisions of section 364 are complied with: *Krishna Mani* v. *Empress*, 6 C. L. R. 289: *Empress* v. *Anantram Singh*, I. L. R. 5 Calc. 954: 6 C. L. R. 297: *Empress* v. *Yakub Khan*, I. L. R. 5 All. 253. In a recent Full Bench case, *Queen-Empress* v. *Nil Madhab Mitra*, I. L. R. 15 Calc. 395, it has been held that the provisions of sections 164, 364 and 533 have no application to statements taken in the course of a police investigation in the town of Calcutta. In cases in which an accused can be convicted on the plea of guilty, his examination need not be recorded: *In the matter of Chumman Shah*, I. L. R. 3 Calc. 756: 2 C. L. R. 317. It is not necessary that the examination of an accused person given in a foreign language, unknown to the Court or Magistrate, should be recorded in that language. The language in which that statement is conveyed to the Court by the interpreter in the language in which it should be recorded: *Empress* v. *Vaimbilee*, I. L. R. 5 Calc. 826.

Irregularities which do not render confessions inadmissible.

The following errors in recording confessions do not render the confessions inadmissible, or at all events may be remedied under the provisions of section 533, *viz.*—(1) the non-recording of the questions put to the accused person: *Titu Miya* v. *Queen*, I. L. R. 8 Calc. 618: 1 C. L. R. 1: *In the matter of the petition of Munshi Sheikh*, I. L. R. 8 Cal. 616: *Empress* v. *Sagambar*, 12 C. L. R. 120: *Empress* v.

Yakub Khan, I. L. R. 5 All. 256: *Feku Mahto* v. *Empress*, I. L. R. 14 Calc. 539; (2) the want of a memorandum in English of the substance of the confession: *Feku Mahto* v. *Empress*, I. L. R. 14 Calc. 539; (3) the fact of the memorandum required by law to be attached to the confession not being in the exact form prescribed: *Empress* v. *Bhairon Singh*, I. L. R. 3 All. 338; and (4) the absence of the Magistrate's full signature: *Queen* v. *Reza Hossein*, 8 W. R. Cr. 55: *Queen* v. *Bhikari*, 15 W. R. Cr. 63.

Irregularities which render confessions inadmissible.

If a confession be not recorded in the language in which it was made, unless it be shown that it was impracticable so to record it, the confession is inadmissible, and such a defect cannot be cured under the provisions of section 533: *Queen-Empress* v. *Nil Madhab Mitra*, I. L. R. 15 Calc. 595: *Jai Narain Rai* v. *Queen Empress*, I. L. R. 17 Calc. 862. But the correctness of the decision in the latter of these cases has been questioned, and it has been said when a confession has been recorded in a language other than the vernacular of the prisoner, it should be presumed, in the absence of evidence to the contrary, that it was impracticable to record it in that language: *Lalchand* v. *Queen-Empress*, I. L. R. 18 Calc. 549. In *Queen-Empress* v. *Viran*, I. L. R. 9 Mad. 224, the questions put and answers given were not written down; they were not taken down in the language in which they were made, but in English: they were not signed by the prisoner or certified by the Magistrate. It was, therefore, held that the confession was inadmissible, and that no secondary evidence of it could be given, for section 533, it was said, will not render the confession admissible where no attempt at all has been made to conform to the provisions of section 164. Under the old Criminal Procedure it has been held that a confession to which the Magistrate has not appended the required certificate is inadmissible: *Noshai Mistri* v. *Empress*, I. L. R. 5 Calc. 958: *Reg.* v. *Shivya*, I. L. R. 1 Bom. 219: as also a confession to which the certificate has not been appended at the time when the confession was recorded, or at any rate on the day it was reduced to writing—*Empress* v. *Daji Narsu and Govinda Natha*, I. L. R. 6 Bom. 288. Confessions in the recording of which almost all the formalities required by law have been neglected, have similarly been rejected: *Queen* v. *Nirunt and Mantrudin*, 7 W. R. Cr. 49: *Empress* v. *Mannu Tamuli*, I. L. R. 4 Calc. 696: 4 C. L. R. 137, and in such cases oral evidence of the confessions has not been admitted: *Reg.* v. *Shivya*, I. L. R. 1 Bom. 219: *Empress* v. *Mannu Tamuli*, I. L. R. 4 Calc. 696: 4 C. L. R. 137. (See *contra*, *Empress* v. *Ramanjiyya*, I. L. R. 2 Mad. 5.)

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into

consideration such confession as against such other person as well as against the person who makes such confession.

Explanation.—'Offence,' as used in this section, includes the abetment of, or attempt to commit, the offence.[1]

Illustrations.

(*a*) A and B are jointly tried for the murder of C. It is proved that A said,—"B and I murdered C." The Court may consider the effect of this confession as against B.

(*b*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

General rule that confession is evidence only against person who made it.

The general rule is that the confession of an accused person is not evidence against any one but himself. When a confession implicated other persons by name, it was held that it should be proved in its integrity, including these names; but that it was the Judge's duty to instruct the jury that it was not evidence against any one but the prisoner who made it. Where two persons were charged with the joint commission of an offence, and one of them on his examination before a Magistrate stated in the hearing of the other, that they both jointly committed the offence, and the other did not deny it, it was yet held that this statement of one was not evidence against the other—*R.* v. *Appleby*, 3 Stark 33.

The above section an exception to this general rule.

The above section of the Evidence Act creates a rule opposed to this decision, and forms an important exception to the general principle that the confession of an accused person is evidence against himself only and not against other persons. See *Queen* v. *Rama Birapa*, I. L. R. 3 Bom. 12. The provisions of the section have received a strict interpretation. It is necessary that the person confessing and the other person against whom his confession is to be *taken into consideration* should be *tried jointly*. When the confessing prisoner pleaded *guilty* and was thereupon convicted and sentenced, it was held that he could no longer be considered as being jointly tried with the others—*R.* v. *Kalu Patel*, 11 Bom. H. C. Rep. 146: *Venkatasami* v. *The Queen*, I. L. R. 7 Mad. 102. One of several persons charged with dakaiti absconded and was arrested and tried subsequently to the others. It was held that the confessions of the persons previously tried could not be taken into consideration against him—*Queen* v. *Baxu*, 21 W. R. Cr. 65. The

[1] This *Explanation* was inserted in section 30 by Act III of 1891, section 4, and sets aside *Queen* v. *Jafir Ali*, 19 W. R. Cr. 57: *Empress* v. *Bala Patel*, I. L. R. 5 Bom. 63: and *Badi* v. *Queen-Empress*, I. L. R. 7 Mad. 579.

two persons must be tried for, or for abetment of, or attempt to commit, the *same offence*. When A and B were being jointly tried, A for murder and B for abetment of murder, and the charge against A was altered during the trial to abetment of murder, a confession by A that he had caused poison to be taken by the deceased at the instigation of B, was held to have been rightly taken into consideration against B: *Reg.* v. *Gobind Babli Raul*, 11 Bom. H. C. Rep. 278. In a case in which two persons were tried together under section 239, P. C., on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of them, and one of them confessed that he had passed the rupees which had been given to him by the other, it was held that this confession was relevant against that other, for it was said that "when two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable therefore of constituting a separate offence from that of his accomplice"—*Queen-Empress* v. *Nur Mahomed*, I. L. R., 8 Bom. 223. In connection with this subject the case of *Empress of India* v. *Karim Baksh*, I. L. R. 2 All. 386, should be consulted.

It was held that effect could not be given to the law, where the Sessions Judge, when about to examine the accused persons, required all to withdraw except the prisoner under examination, so that the other prisoners had no opportunity of denying or even knowing what was said by the confessing prisoner behind their backs: *Empress* v. *Chandra Nath Sirkar*, I. L. R. 7 Calc. 65: 8 C. L. R. 352: *Empress* v. *Lakshman Bala*, I. L. R. 6 Bom. 124: *Queen Empress* v. *Bipin Biswas*, I. L. R. 10 Calc. 970.

The Court may, under the provisions of the section, take into consideration a *confession* made by one of two or more persons tried jointly for the same offence, as well against any other of such persons affected by the confession as against the person who made it. The statement must amount to a confession of guilt, and as such, it must affect the confessing prisoner himself as well as the other accused against whom it is taken into consideration; and against this latter it should be considered only so far as it substantially implicates the person who has confessed his own actual participation in the commitment of the offence, for which the accused persons are tried jointly. In *Queen* v. *Mohesh Biswas* (10 B. L. R. 455 note: 19 W. R. Cr. 16), Phear, J., said:—"It appears to me that this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only, as that particular statement of fact itself extends against the other prisoners, who are being tried as well as himself for the offence which is thus confessed. I think the illustrations which are given to this section bear out this view. If this be so, we must be careful not to apply statements made by A before the Magistrate against other prisoners than himself further than those same statements amount in

Statement must substantially implicate person making it.

themselves to a confession of guilt on his part." In *Queen* v. *Belat Ali* (10 B. L. R. 458 : 19 W. R. Cr. 67), the same learned Judge said :—" The view which I take as to the proper application of section 30 . . . . is shortly this, namely, that before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. It seems to me that it is this implication of himself by the confessing person which is intended by the Legislature to take the place, as it were, of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. In the case before us neither K nor B say anything which amounts to a confession of their own individual guilt upon the charge whereon they were tried jointly with the appellants. Both these men distinctly keep themselves out of all complicity in the actual facts which are charged against all the prisoners jointly, and upon which the appellants have been convicted with the others; so that it appears to my judgment that the statements which these men make against the appellants are simply, so far as the charge upon which they have been convicted is concerned, statements made without either the sanction of an oath, or of that substitute for that sanction to which I have already referred, namely, the implication of themselves on the charge upon which they have been tried with the appellants—in short, without the application of any test of truth whatever." See also *Queen* v. *Banwari Lal*, 21 W. R. Cr. 53 : *Reg.* v. *Amrita Gobinda*, 10 Bom. H. C. Rep. 500 : *Queen* v. *Keshab Bhunia*, 25 W. R. Cr. 8 : *Queen* v. *Baiju Chaudhri*, 25 W. R. Cr. 43 : *Nur Baksh Kazi* v. *Empress*, I. L. R. 6 Calc. 279 : 7 C. L. R. 385 : *Empress* v. *Daji Narsu*, I. L. R. 6 Bom. 288 : *Queen-Empress* v. *Nur Mahomed*, I L. R. 8 Bom. 223 . *Empress* v. *Ganraj*, I. L. R. 2 All. 444, and *Queen-Empress* v. *Jaytup*, I. L. R. 7 All. 646.

With respect to the words "take into consideration," Jackson, J., said in *Queen* v. *Chandra Bhattacharjya* (24 W. R. Cr. 42):—" The section does not provide, as has been repeatedly pointed out by this Court, that such confession is *evidence;* still less does it say, that it shall be the foundation of a case against the person implicated. The Legislature very guardedly says that it may be 'taken into consideration,' and I think the obvious intention of the Legislature in so saying was that, when, as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence." In the same case it was observed that when a written confession is to be used for the above purpose, the person to be affected by it has a right to demand that it be strictly proved and shown to have been in all essential respects taken and recorded as prescribed by

A confession is evidence against co-accused.

law. It may be remarked that as the term 'evidence' applies to statements made by *witnesses* (section 3, *ante*), and as witnesses must be examined on oath or solemn affirmation, this term could scarcely be applied to a statement made by an accused person not upon oath or solemn affirmation. It was subsequently decided by a Full Bench of the Calcutta High Court that the confession made by one prisoner is *evidence* against another prisoner tried jointly with him for the same offence. In this judgment Jackson, J., concurred (*Empress* v. *Ashutosh Chakravartti*, I. L. R. 4 Calc. 483). In the same case it was decided that the word 'Court' in section 30 means not only the Judge, but also the Jury when the trial is held before a Judge and a Jury.

The statement of a confessing co-accused is affected with the infirmity inherent in an accomplice's testimony; and it is further less valuable in that it is not made under the sanction of an oath, nor can it be tested, developed or explained by cross-examination. It will not therefore be sufficient corroboration of an accomplice's testimony in order to make good a conviction which would have been bad without it: *Queen* v. *Naga*, 23 W.R. Cr. 24: *Queen* v. *Jafir Ali*, 19 W. R. Cr. 57: *Queen* v. *Sadhu Mandal*, 21 W. R. Cr. 69: *Reg.* v. *Budhu Nunku*, I. L. R. 1 Bom. 475. An accused person cannot be convicted solely on the confession of a co-prisoner jointly tried with him for the same offence: (*Empress* v. *Ashutosh Chakravartti*, I. L. R. 4 Calc. 483: 3 C. L. R. 270: 7 Mad. H. C. Rep. App. xv: *Reg.* v. *Ambigara Hulagu*, I. L. R. 1 Mad. 163: *Empress* v. *Bhawani*, I. L. R. 1 All. 664 *Empress* v. *Ram Chand*, I. L. R. 1 All. 675: *Queen-Empress* v. *Bipin Biswas*, I. L. R. 10 Calc. 970: and *Queen-Empress* v. *Dosa Jiva*, I. L. R. 10 Bom. 231 *Queen-Empress* v. *Khandia Bin Pandu*, I. L. R. 15 Bom. 66. In *Queen-Empress* v. *Dosa Jiva* it was further held that the mere production of the stolen property by the accused was not a sufficient corroboration of the confession of the other prisoner.

Confession of co-accused requires corroboration

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Admissions not conclusive proof, but may estop.

As to estoppels, see section 115 *post*, the note to which may be usefully read with this note. With regard to the effect of admissions, "it is to be observed," says Mr. Taylor, "that the policy of the law favours the investigation of truth by all expedient methods; and that the doctrine of estoppels by which further investigation is precluded, being an exception to the general rule and being adopted only for the sake of general convenience and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded. It is also to be observed that estoppels bind only parties and privies and not strangers"—§ 741: § 817, 8th edn. It is therefore a general doctrine that a party is at liberty to prove that an

admission made by him was mistaken or untrue, and he is not estopped by it, unless another person has been induced thereby to act upon it or to alter his condition.

Two defendants in a suit brought against them by a third person as plaintiff pleaded that an instrument constituting a conditional mortgage had been executed by one of them in favour of the other. In a subsequent suit brought by one of them, the alleged mortgagee, against the other, the alleged mortgagor, it was held that the latter was not estopped by this statement from showing that the mortgage was a sham transaction for the purpose of saving the property from falling into other hands. "With regard to the supposed estoppel by pleading," said their Lordships of the Privy Council, "it is clear that a pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them"—*Ram Saran Singh* v. *Pran Piyari*, 13 Moo. I. A. 551. In the case of *Ashrafunnissa Begum* v. *Girdhari Lal* (19 W. R. 118), their Lordships held that the fact of a party having admitted the execution of a deed in a former suit did not prevent her from contesting the validity of the transaction evidenced thereby and showing that it was colourable and not real. See also *Srinath Rai* v. *Bindhu Bashini Debi*, 20 W. R. 112 *Debi Chaudhrain* v. *Bimola Sundari Debi*, 21 W. R. 422: and *Brajendro Kumar Rai Chaudhri* v. *The Chairman of the Dacca Municipality*, 20 W. R. 223. In the last case, Couch, C. J., said:—"Unless it were shown that the defendant had acted upon those representations and was induced by them to become the purchaser, the present plaintiff would not be concluded by them. If they were to be treated merely as admissions by her, and not as having been acted upon, it was allowable to her to show, that they were not true. The modern decisions go so far as to say that even if they had been made fraudulently, she might show what was the truth."

Cases in which admissions were held not to operate as estoppels.

In the case of *Chandra Kant Chakravartti* v. *Piyari Mohan Dutt*, (5 W. R. 209) the question was whether the plaintiff or his mother was the real owner of certain lands. The plaintiff had in several cases admitted that his mother was the owner, and in two suits brought by her for rent, in which she based her right to sue upon a purchase from him, he had acted as her *mukhtar* and signed her name by procuration. The lands were brought to sale in execution of a decree against her. In a suit by the plaintiff to recover them, on the ground that he had only mortgaged them to his mother, and that the mortgage-debt had been paid up, it was held that these admissions were evidence against the plaintiff, although they did not amount to an estoppel, inasmuch as they had not been made to the purchaser or any one concerned, and there was no proof that these parties ever heard of them, or were in any way misled by them or had made their purchase in reliance on them.

A Hindu died, leaving a widow and a minor son. On the death of the latter the widow became heir, but it was alleged that she had relinquished her rights in favour of her son's wife by a petition, in which she had

admitted the latter to be co-heir with her son, and had allowed her name to be registered as such in the proprietary register. Having regard the object of this petition, which was intended to obviate an objection which had been taken in a certain suit for redemption, it was held that there was no estoppel—*Lado* v. *Oodey Kunwar*, 1 N. W. P. Rep. F. B. 23. This decision was confirmed on appeal by the Privy Council (13 Moo. I. A. 600), their Lordships remarking that the daughter-in-law did not act on the representation contained in the petition or alter her position in any way, being as well acquainted with the facts of the case as the mother; and that the real effect of the petition seemed to be that they two mutually agreed to represent what was not the fact for the purpose of enabling a certain suit to be carried on. In the case of *Forbes* v. *Mir Mahomed Taki* (5 B. L. R. 510) an admission in a previous suit as to the identity of certain lands, though not allowed the effect of an estoppel, was held to cast upon the person who made it the burden of showing that what was then deliberately asserted was not the fact. The principle applies when the admission was made under a mistake in respect of legal liability: *Newton* v. *Liddiard*, 18 L. J. Q. B. 53. Where a person under the erroneous impression that the adoption of a second son L, while a first adopted son A was living, was valid, represented in previous suits and in various ways that L was the adopted son of D, it was held that this did not create an estoppel, there being no misrepresentation on any matter of fact, as L was admitted to have been actually adopted, and there being merely an erroneous conclusion that such adoption was valid in law: *Gopi Lal* v. *Sri Chandraoli Bahuji*, 19 W. R. 13: *Yashvant Puttu Shenvi* v. *Radhabai*, I. L. R. 14 Bom. 312.

Other cases to the same effect are *Grish Chandra Ghosh* v. *Ishar Chandra Mukherji*, 3 B. L. R. A. C. 337: 12 W. R. 226: *Kamarudin* v. *Manai Mondal*, 16 W. R. 229: *Bodh Singh Dudhuriya* v. *Ganesh Chandra Sen*, 12 B. L. R. 317: 19 W. R. 356: *Janan Chaudhri* v. *Dular Chaudhri*, 18 W. R. 347: *Phul Bibi* v. *Gur Saran Das*, 18 W. R. 485: *Sheo Prasad* v. *Jagar Nath*, L. R. 10 I. A. 74. In another case it has been said that any statement made by a party may be used as evidence against him, and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case, and the result come to by judicial investigation: *Ayetan* v. *Ram Sebak Poddar*, 12 W. R. 156. See also *Srinath Nag Mazumdar* v. *Man Mohini Dasi*, 6 W. R. 35: *Gordon, Stuart & Co.* v. *Bijai Govind Chaudhri*, 8 W. R. 291: *Mahomed Hanif Meaji* v. *Mazhar Ali*, 15 W. R. 280: *Bhagwan Chandra Datta* v. *Micha Lal Chakravartti*, 17 W. R. 372.

In connection with the present subject, it may be mentioned that the acknowledgment of a child as being the offspring of the acknowlediger, when the ages of the parties admit of the paternity, and where the descent of the person acknowledged from another has not been already established, is, according to Muhammadan law, not merely *primâ facie* evidence which may be rebutted, but it establishes the fact acknowledged: *Umda*

Acknowledgment of child by father under Mahomedan law.

Bibi v. *Janab Ali*, 5 W. R. 132. *In the matter of the petition of Najibunissa*, 4 B. L. R. A. C. 55 ; *Nazmudin Ahmad* v. *Bibi Zahuran*, 10 W. R. 45 : *Fazilan Bibi* v. *Umda Bibi*, 10 W. R. 469 : *Jaiban* v. *Nazibunnissa*, 12 W. R. 497: *Wahidan* v. *Wasi Hossain*, 15 W. R. 403 : *Nobo Kanth Rai Chaudhri* v. *Mahatab Bibi*, 20 W. R. 164 : *Khajurannissa* v. *Roshan Jehan*, I. L. R. 2 Calc. 184 : 26 W. R. 36 : L. R. 3 I. A. 291 : *Azmat Ali Khan* v. *Lalli Begum*, L. R. 9 I. A. 8 : I. L. R. 8 Calc. 422 : *Mahatala Bibi* v. *Halimuzuman*, 10 C. L. R. 293 : *Sadakat Hossein* v. *Mahomed Yusuf*, I. L. R. 10 Calc. 663 : L. R. 11 I. A. 31 : *Mahamad Aslahjad Khan* v. *Mahamad Ismail Khan*, I. L. R. 8 All. 234 : 10 All. 289, and Baillie's Digest of Mahomedan Law, p. 403. The acknowledgment should be clear and distinct : *Kedarnath Chakravartti* v. *Donzelle*, 20 W. R. 352 ; but need not be of such a character as to be evidence of marriage : *Wahidan* v. *Wasi Hossein*, 15 W. R. 403. But in *Mir Ashraf Ali* v. *Mir Ashad Ali*, 16 W. R. 260, it has been held that notwithstanding Mahomedan law, a court of justice cannot pronounce a child to be the legitimate offspring of a particular individual where such a conclusion would be contrary to the course of nature and impossible. The following cases may also be consulted, *viz.*—*Hidayatuia* v. *Jan Khanum*, 3 Moo. I. A. 295 : *Mahomed Bakhir Hosein* v. *Sharafanissa Begam*, 3 W. R. P. C. 37 : *Nawabanissa* v. *Fazlunissa*, Marsh. Rep. 428 : *Ashrafanissa* v. *Aziman*, 1 W. R. 17 : *Roshan Jahan* v. *Enayat Hossein*, 5 W. R. 4 : *Jeswant Singhji* v. *Jet Singhji*, 2 Moo. I. A. 424. As to acknowledgment as a brother, see *Mirza Himmat Bahadur* v. *Sahebzadi Begum*, 13 B. L. R. 182 : L. R. 1 I. A. 23 : 21 W. R. 113.

Whole admission to be considered.

The whole statement containing an admission ought to be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him cannot be ascertained. When a plaintiff has framed his title specifically in one way, he cannot, on failure to establish his own case, fall back upon a case, taken from defendant's statements, unless he consents to take it in its entirety; *Tarini Prasad Sen* v. *Dwarka Nath Rakhit*, 15 W. R. 451. See, in connection with this point, section 39, *post*. This applies equally to written and verbal admissions. But though the whole of the statement made at the same time and relating to the same subject must be given in evidence, it does not follow that all the parts of such statement should be regarded as equally deserving of credit. The Court or the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him—Taylor, §§ 655, 656 ; §§ 725, 726, 8th edn. *Nilmani Singh Deo* v. *Ramanugrah Rai*, 7 W. R. 29 : *Radha Charan Chaudhri* v. *Chandra Mani Sikdar*, 9 W. R. 290 : *Pulin Behari Sen* v. *Watson and Co.* (Full Bench), 9 W. R. 190 : *Baikanth Nath Kumar* v. *Chandra Mohan Chaudhri*, 1 B. L. R. A. C. 133 : 10 W. R. 190. The principle established

by the last two cases is, that if a man makes a qualified statement, that statement cannot be used against him apart from the qualification. If a man, however, makes a series of independent unqualified statements, there is nothing to prevent such statements being used separately. In the case of *Baikanth Nath Kumar* the plaintiff sued to recover possession of certain ancestral *jamai* lands, from which he alleged that he had been dispossessed by the defendant. The defendant, in his written statement, alleged that the plaintiff's ancestor had relinquished the lands; that the zamindar having thus acquired a right to them had leased them to him; that he had been since in possession, and that he had not dispossessed the plaintiff. It was observed that there were two distinct statements of facts made by the defendant—*first*, that the plaintiff's ancestor held the tenure and was in possession up to a certain date; *second*, that on that date the plaintiff's ancestor relinquished the lands, a settlement of which was therefore made with the defendant; that in what was said as to relinquishment and subsequent settlement, there was no qualification whatever of the statement and admission by the defendant, that the plaintiff's ancestor held the tenure for a certain time. It was, therefore, decided, that the defendant having admitted the plaintiff's (ancestor's) possession, it lay on him to prove the relinquishment: and, as he had not done this, that the plaintiff was entitled to succeed. In the case of *Kunwar Durganath Rai* v. *Ram Chandra Sen* (L. R. 4 I. A. 52), the plaintiff sued to set aside certain alienations of two-thirds of an ancestral estate on the ground that the estate was endowed (*devutter*) property, dedicated to the worship of an idol, and could not be alienated. The deeds by which the alienations were effected contained certain statements admitting the fact of the property being *devutter*, and these statements were relied upon as estopping the alienees from saying that the property was not *devutter*. The deeds also contained statements that the alienations were made for necessary purposes. The Privy Council considered that these statements must be taken as a whole; and so taking them, it would appear that, granting the lands were *devutter*, the alienations, being made for necessary purposes, were justifiable. In a suit for enhanced rent the plaintiff averred that the defendant and his predecessors had held the tenure without any change in the rent, but that the ure had been created long after the Permanent Settlement. It was decided that the defendant could not use in his favour the allegation as to the rent not having been changed without being also bound by the allegation of the tenure having been created subsequent to the Permanent Settlement (*Jadunath Rai* v. *Baroda Kanth Rai*, 22 W. R. 220). See also *Niamatullah Khadim* v. *Himmat Ali Khadim*, 22 W. R. 519. In another case, *Sarfaraz Mollah* v. *Dhopi*, 16 W. R. 257, in which the defendant had admitted the plaintiff's tenancy, and had thereby excluded the plaintiff's evidence on this particular point, it was held that he was not entitled to say that the plaintiff had relied on his written statement as evidence, and, that being so, that he must allow the whole of that written statement to be read as part of the evidence.

Admissions made in pleading.

In several of the cases above referred to, the admissions were contained in the written statements of the parties made in the case under trial. The provisions of the Evidence Act are not restricted to admissions made at any particular time or place, and are wide enough to include admissions made in pleading. The rules of pleading in the Courts in India are very different from the rules followed in England. A written statement is not a pleading in confession and avoidance by which the defendant is bound by the confession and so compelled to prove the avoidance. If used against him, as it may be used, the whole statement must be taken together: *Sultan Ali* v. *Chand Bibi*, 9 W. R. 130: *Pulin Behari Sen* v. *Watson & Co.* 9 W. R. 190. There is a rule in English Courts of Law, that *whenever a material averment well pleaded is passed over by the adverse party without denial, it is thereby conclusively admitted.* As to the applicability of this rule to India, the following remarks in the case of *Anand Mayi Chaudhrain* v. *Sib Chandra Rai* (9 Moo. I. A. 305: 2 W. R. P. C. 19) may be noticed:—"Their Lordships cannot apply to the pleadings in these Courts the strict rule, that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the plaintiff and Haro Mani, would have dispensed with the necessity of proving the instrument." See also *Sonatan Saha* v. *Ramjai Saha*, Marsh., 549: *Prabhu Das* v. *Sheonath Rai*, W. R. 1864, Act X, 27. *Shadhu Singh* v. *Ramanugraha Lall*, 9 W. R. 83 *Bhuban Chandra Shom* v. *Ram Dyal Shamonto*, 14 W. R. 55: and *Hamidullah* v. *Genda Lal*, 17 W. R. 171. As to the effect of an admission by implication, in the case of *Amirto Lal Basu* v. *Rajani Kanth Mitra*, 15 B. L. R. 23: 23 W. R. 214: L. R. 2 I. A. 113, their Lordships of the Privy Council said:—"There is merely an admission *by implication* in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact (*Edmonds* v. *Groves*, 2 M. and W. 642: *Smith* v. *Martin*, 9 M. and W. 304: *Robins* v. *Maidstone*, 4 Q. B. 815); and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India." There are a few cases, however, in which the Courts of the country have followed the English rule as to pleadings. In *Chandi Charan* v. *Mobarak Ali*, 12 W. R. 469, it was said that as there was no traverse by the defendants of the plaintiff's allegations of their being *patnidars*, therefore, under the ordinary rules of pleading, this position of theirs required no further proof. In *Ahmadi Begam* v. *Debi Prasad*, 18 W. R. 287, it was held that averments upon which no issue is framed, should be taken to be admitted.

In recasting the Code of Civil Procedure it was at first proposed to enact that every allegation of fact in any written statement, if not denied specifically or by necessary implication or stated to be not admitted by the opposite

party, shall be taken to be admitted for the purposes of the suit. This section was however struck out in Committee, and instead thereof it has been enacted that, at the first hearing of the suit, the Court shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made; and shall record such admissions and denials (section 117 of Act XIV of 1882). See, in connection with this point, section 58, *post*. The duty imposed by this section is not very carefully performed in the Subordinate Courts. There is reason to believe that a proper use of the section would considerably shorten many of the lengthy and laborious proceedings in these Courts.

Admissions by infant.

It has been already observed that, as an infant cannot appoint an agent, he cannot be bound by the admissions of an agent acting for him. But admissions made by the infant himself may be proved in an action brought against him after obtaining his majority—*O'Neill* v. *Read*, 7 Ir. Law Rep. 434: and see *Dharmaji Vaman* v. *Gurrao Shrinivas*, 10 Bom. H. C. Rep. 311. Such admissions might relate to the receipt of goods or to other matters, but would not, of course, affect the question of liability in cases in which a minor would not be liable on a contract unless such contract were ratified by him after obtaining his majority. See section 11 of the Indian Contract Act, IX of 1872, as to incompetency to contract by reason of nonage.

Admissions by conduct.

Admissions by *conduct* are treated by English text-writers under the general head of admissions. For example, the suppression of documents is an admission that their contents are unfavourable to the party suppressing them; the entry of a charge to a particular person in a tradesman's book is an admission that the goods were furnished on his credit; payment of money is an admission against the payer that the receiver is the proper person to receive it[2]; delay in suing to enforce alleged rights may be construed as an admission of their non-existence: *Jagarnath Sahu* v. *Mahomed Hosein*, 14 B. L. R. 386: *Rajendronath Haldar* v. *Jogendronath Banarji*, 14 Moo. I. A. 67. The original draft of the Evidence Act contained the following section:—

Admissions by conduct.

"The conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done, are relevant facts, when they render probable or improbable any relevant fact alleged or denied in respect of the person so conducting himself."

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[2] But not against the receiver that the payer was the person who was bound to pay it, for the party receiving payment of just demand may well assume without inquiry that the party tendering the money was the person legally bound to pay it.

The provisions of this proposed section are, however, incorporated in other parts of the existing Act, see Illustrations (*f*), (*g*), (*h*), and (*i*) to section 8, section 11, and Illustrations (*g*) and (*h*) to section 114.]

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

When it relates to cause of death;

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business;

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose

him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom, or matters of general interest;

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

or relates to existence of relationship;

(5) When the statement relates to the existence of any relationship [by blood, marriage or adoption][3] between persons as to whose relationship [by blood, marriage or adoption][3] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs;

(6) When the statement relates to the existence of any relationship [by blood, marriage or adoption][3] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or in document relating to transaction mentioned in section 13, clause (*a*);

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

or is made by several persons, and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

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[3] The words in brackets were added by the amending Act, XVIII of 1872.

Illustrations.

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

See *Queen* v. *Bissoranjan Mukharji*, 6 W. R. Cr. 75, but decided in 1866.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price made by a deceased banya in the ordinary course of his business, is a relevant fact.

(*k*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact

(*m*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(*n*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

This is a most important section; and the student, who would comprehend its full scope and meaning, will have to study it carefully. In connection with the subject see Lord Blackburn's judgment in *Sturla* v. *Freccia* (L. R. 5 App. Cas. 639). As a general rule, oral evidence must be direct (see section 60, *post*): in other words, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner. It may happen, however, that a witness, who, if present before the Court, could give this direct evidence, is dead, or cannot be found, or has become incapable of giving evidence in consequence of physical or mental injury or disease; or it may be that his attendance cannot be procured without an amount of delay or expense, which, having regard to the circumstances of the case, it would be unreasonable to incur and it may also be that this witness has made a statement, *either written or verbal*, with reference to the fact (which must be a *relevant* fact) under such circumstances that the truth of this statement may reasonably be presumed. The law here dispenses with direct oral evidence of the fact and with the safeguards for truth provided by cross-examination and the sanctity of an oath, and allows that statement to become evidence, the probability of its being a true statement depending upon other safeguards, which will be noticed in connection with each exception to the general rule—for the eight cases provided for by the eight paragraphs of this section may be regarded in the light of exceptions to the general rule that oral evidence must be direct. They

are, in fact, treated by English text-writers as exceptions to the rule that hearsay evidence is inadmissible; but it will be remembered that the phrase 'hearsay evidence' is excluded from the Code. The Select Committee in their First Report say: "The phrase 'hearsay evidence,' which is used by English writers in so vague and unsatisfactory a manner, finds no place in our draft, and we hope we have avoided the possibility of any confusion in connection with it. Chapter II provides specifically, and in a manner which corresponds on the whole (though with some modifications) with the English law, in what cases the statements and opinions of third persons as to relevant facts shall, and in what cases they shall not, be themselves relevant; and Chapter V, on *Proof by Oral Evidence*, provides that oral evidence shall in al cases be direct, on whatever ground the fact which it is to establish may be relevant to the issue, that is to say, if the fact is one which could be seen, it must be established by a witness who says he saw it; if it could be heard, by a witness who says he heard it—whether it is a fact in issue or a collateral fact. These provisions distribute the different things described by the phrase 'hearsay evidence.' The case stands thus, therefore. English writers start by laying down the general rule that 'hearsay is no evidence,' and then proceed to state the exceptions to this rule, amidst the number and intricacy of which the rule itself is too often lost sight of. The Indian Code, on the other hand, while laying down as a general rule that oral evidence must be direct, embodies what might appear to be the exceptions to this rule in separate and distinct rules, regarding the subject-matter of these supplementary rules from an independent standpoint of view afforded by the idea of 'relevancy.' If this difference in the mode of treating the subject be carefully borne in mind, the following exposition of the section (which follows the order of the section itself) will be the more readily and clearly understood.

Statements as to cause of death, &c.

1. The first case, in which statements made by persons who cannot be called as witnesses are declared relevant, goes much further than the rule of English law under which *dying declarations*, as they are called, are admissible. In order to render such declarations admissible, it is necessary that the declarant should have been in *actual danger of death*, that he should have been *aware of this danger*, and that *death should have ensued*. The reason why this kind of evidence has been admitted is thus stated by Lord Chief Baron Eyre: "They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered b the law as creating an obligation equal to that which is imposed by a positive oath in a Court of Justice." "At one time," says Mr. Taylor, "an opinion prevailed that this general principle warranted the admission o dying declarations in all cases, civil and criminal; and it was expressly

held by respectable authorities, that the dying declarations of a subscribing[4] witness to a forged instrument were admissible to impeach it. A contrary doctrine, however, has since prevailed, and *it is now settled law, both in England and America, that evidence of this description is admissible in no civil case; and, in criminal cases, only in the single instance of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.* Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected; and, where a prisoner was indicted for administering drugs to a woman with intent to procure abortion, her statements *in extremis* were held to be inadmissible. . . . In Ireland, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his deathbed confessed that he had committed the crime." Mr. Taylor gives three reasons for restricting the application of the principle to cases of homicide,—*first*, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain; *secondly*, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute the whole truth; and, *thirdly*, the experienced fact that implicit reliance cannot in all cases be placed upon the declarations of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they chose to suggest. These considerations would be well borne in mind when estimating the *weight* to be allowed to dying statements in particular cases, but they have never been regarded in India as a sufficient argument for the exclusion of this kind of evidence in all cases other than those of homicide. The law on this subject was formerly contained in section 371 of Act XXV of 1861, and section 29 of Act II of 1855; and it was decided under those sections that the rule of English law restricting the admission to cases of homicide had no application in India—*Queen* v. *Bissoranjan Mukharji*, 6 W. R. Cr. 75. It was here remarked that the law of England on the subject has been much narrowed of late years, and that there are instances in the older books in which dying declarations had been admitted even in civil cases. The Evidence Act now enacts that statements made by a person as to *the cause of his death or as to any of the circumstances of the transaction which resulted in his death*, are relevant, *whatever may be the nature of the proceeding in which the cause of the death of the person, who made the statement, comes into question*; and Illustration (*a*) gives an example of a civil as well as of a criminal case.

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[4] It has since been decided that declarations made by a deceased attesting witness respecting the attested instrument are not admissible, though being admissions of fraud or forgery on his own part, and though his handwriting has been proved as proof of the instrument (*Stobart* v. *Dryden*, 1 M. and W. 615). But these declarations would be admissible in India, as exposing to a criminal prosecution, see p. 184.

There is another important point of distinction between the law contained in the Indian Evidence Act and the law as administered in England; and, indeed, I may add, as previously administered in India. According to English law, the declarant must have been in *actual danger of death*, and must have had *full apprehension of his danger*. With respect to this belief of impending death, Mr. Taylor observes: "*It is not necessary that the declarant should have stated* that he was speaking under a sense of impending death, provided it satisfactorily appears in any mode, that the declarations were really made under that sanction; as, for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to in order to ascertain the state of the declarant's mind." Under the Indian Evidence Act the statement is relevant, *whether the person who made it was or was not at the time when it was made under expectation of death*. Whether the declarant was or was not in actual danger of death, and knew or did not know himself to be in such danger, are therefore considerations which will no longer affect the *admissibility* of this kind of evidence in India: *Queen* v. *Digambar Thakur*, 19 W. R. Cr. 44: *Empress* v. *Bechynden*, 6 C. L. R. 278. But these considerations ought not to be laid aside in estimating the *weight* to be allowed to the evidence in particular cases. The statement is not admissible under English law, unless the death of the person who made it has ensued. Under the Indian Evidence Act the same rule will prevail, inasmuch as the statement is admissible only in cases in which the cause of the *death* of the person who made it comes in question. See *Nobin Krishna Mukharji* v. *Rasik Lal Laha*, I. L. R. 10 Calc. 1047 No question of admissibility can, therefore, arise until the declarant is dead.[5]

Before, however, the statement is admitted, proof must be given that the person who made it is *dead*, and the burden of proving this is on the person who wishes to give the statement in evidence; see section 104, *post*. Where a Judge is sitting with a Jury, the admissibility of this evidence in any particular case is a question to be decided by the Judge alone; see section 298 of the Code of Criminal Procedure (Act X of 1882), and the authorities collected in Mr. Taylor's work, § 22; §§ 23, 24, 8th edn. The statement will, of course, be admissible only if the person who made it, being present, would be allowed to make the same statement in the witness-box. For example, it would not be admissible if made by person whom the Court, under the provisions of section 118, *post*, considered incompetent to testify.

[5] It may be observed that the words "or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot," &c., in the first part of the section have no application in connection with this first paragraph.

It frequently happens in India that a Magistrate is called upon to take down the statement of a person who has been brought from the interior of a district to head-quarters severely injured, or, it may be, in a moribund condition. Where the circumstances of the case permit, the statement should be taken in the presence of the accused, and should be written as a formal deposition in accordance with the provisions of Chapter XXV of the Code of Criminal Procedure, Act X of 1882. If this be done, and the injured person die or become incapable of giving evidence at the Sessions, the deposition so taken will be admissible in evidence, subject to the provisions of section 33, without further proof—see section 80, *post*. If the statement be not taken down in the presence of the accused and as a formal deposition, it will be none the less *relevant* under the above section; but, before it can be admitted in evidence, it must be proved to have been made by the deceased—*Reg.* v. *Fakir Adin*, 11 Bom. H. C. Rep. 247: and there is nothing in the law which renders it admissible without such proof because it was taken down by a Magistrate. The writing made by such Magistrate cannot, however, be admitted to prove the statement made by the deceased. The statement must be proved in the ordinary way by a person who heard it made. If the Magistrate be called to prove it, he may refresh his memory with the writing made by himself at the time when the statement was made.—*Empress* v. *Samirudin*, I. L. R. 8 Calc. 211 10 C. L. R. 11. Such a statement ought to be made, as far as possible, complete in itself; for if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, its value as evidence will be materially affected. It will, of course be admissible as well for the accused as for the prosecutor. Under sec. 162, Code of Criminal Procedure, no statement other than a dying declaration made by any person to a Police-officer in the course of an investigation shall, if reduced to writing, be signed by the person making it or shall be used as evidence against the accused. This would seem to imply that a dying declaration, made to a Police-officer in the course of an investigation may, if reduced to writing, be signed by the person making it, and may be used as evidence against the accused; but the section does not enact this expressly, and according to the ruling in *Empress* v. *Samirudin*, this would appear not to be the case. But if the dying declaration is embodied in a First Information report, as is sometimes the case, then it would appear that, as the first information of a cognizable case is required by law (sec. 154, Criminal Procedure Code) to be reduced to writing, the report itself must be produced (sec. 91, *post*), and that after due proof of the statement contained in it having been made by the deceased, it may be admitted in evidence under the provisions of this clause.

In the case of *Queen-Empress* v. *Abdullah*, I. L. R. 7 All. 385, the accused was tried for the murder of one Dulari. The deceased had been questioned by a Police-officer, a Magistrate and a Surgeon; she was unable to speak; but was conscious and able to make signs. Evidence was offered to prove the questions put to Dulari, and the signs which she had made in answer

to such questions. The evidence was admitted by the Sessions Judge, and a Full Bench of the Allahabad High Court held that the evidence had been rightly admitted, as the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act.

The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and, as remarked by Mr. Phillips, the particulars of the violence may have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his *inferences* from facts concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Any one who has ever taken down the statement of an illiterate man suffering from severe injuries, will fully realize the truth of these remarks. The deponent, at no time very competent to draw a clear distinction between knowledge obtained through the medium of his own senses, and that which he has heard or imagined, is less than ever able to discriminate when distracted and enfeebled by physical suffering. Falsehood must also be guarded against, and this more especially in India. I have, in the course of my experience, met several cases which strongly impressed me with the necessity of exercising the greatest possible care and discrimination in estimating the value to be assigned to this kind of evidence; and in more than one instance I have known a statement made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue.* "Where a witness," says Mr. Taylor, "has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his

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* The following case came before me some years ago. A woman had two sons, who married B and C respectively. The sons went from home on business which detained them a couple of months away, the three women remaining alone. The brother of the headman of the village, who was also a relation, tried to seduce C in the absence of her husband. B saw through his design, begged him not to disgrace the family, and threatened to tell his wife and their relations. He watched his opportunity and attacked her with a *dao* (a big knife), inflicting the most frightful injuries. He had clearly determined to remove her from his path. The woman was carried into hospital, and, while expected to die every moment, she made a statement to the Magistrate that her injuries had been inflicted by a lunatic living in the same village. She made a miraculous recovery, and having regained strength charged the real culprit, whose brother, the headman of the village, had invented the story of the lunatic having inflicted the injuries, and had induced her to tell it. She described, in a manner that left no doubt as to the truth of her tale, how she was over-persuaded by the whole family, including her own mother, who felt helpless in the absence of her sons; and how the accused had assisted in carrying her into the hospital and had there remained, ostensibly watching over her, but really to prevent her from altering her statement. It was only on her husband's return that her mind got free of these influences, and she told the truth.

statements, and give a false colouring to the whole transaction." In a country in which the passion of revenge is one of the most remarkable features in the character of the inhabitants, these remarks have a special applicability.

Statements made in the course of business.

II. Statements, written or verbal, of relevant facts, made in the ordinary course of business by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are relevant. The considerations which have induced the Courts to admit this kind of evidence appear to be principally these: that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.[7] The value of the evidence will, of course, considerably depend upon the concurrence of two or more of the above circumstances. The leading case in English law on this present subject is that of *Price* v. *The Earl of Torrington*.[8] The facts of this case were as follow.—The plaintiff, a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was this, that the way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, *to which the draymen set their names*, and that the drayman was dead, but this was his hand set to the book; *and this was held good evidence of a delivery, otherwise of the shop-book itself singly without more*. The following are other instances of the application of the rule: The endorsement of service on a copy of a notice made by an attorney, who served it, was admitted after his death as proof of service. An entry by a deceased solicitor in his diary of his having attended a client on a certain day on her executing a deed of appointment, was held sufficient evidence of the due execution of the deed [*Rawlins* v. *Rickards*, 28 Beavan's Rep. 370, and see Illustration (*c*).] The entry of the receipt of taxes by a deceased clerk of the Collector, *who was duly appointed*, was admitted as evidence of their payment. The letter-book of a merchant, in which a deceased clerk had made a copy of a letter and a

[7] Taylor, § 630 · § 697, 8th edn.

[8] See 1 Smith's Leading Cases, 277. 1 Salkeld's Reports, 285. 2 Lord Raymond's Reports, 873.

memorandum of having sent the original, was admitted as proof of the sending, and also of the contents of the original, after defendant, having been served with notice, failed to produce it. In the following case the evidence was held *inadmissible*:—It was the ordinary duty of one of the workmen at a coal-pit, named *Harvey*, to give notice to the foreman of the coal sold. The foreman, *who was not present when the coal was delivered*, being himself unable to write, employed a man named Baldwin to make the entries in the books from his dictation, and these entries were read over every night to the foreman. Harvey and the foreman being dead, Baldwin was called with the book to prove delivery of the coal; but the evidence was held inadmissible, on the ground that although the entries made under the foreman's direction might be regarded as made by him, yet, as he had no *personal knowledge* of the facts stated in them, but derived his information at second hand from the workmen, there was not the same guarantee for the truth of the entries as in *Price* v. *Torrington*, where the party signing the entry had himself done the business (*Braun* v. *Presce*, 11 Meeson and Welsby's Rep. 773).

But in *Reg.* v. *Hanmanta*, I. L. R. 1 Bom. 610, it has been held that this is not the law in India. In this case certain broker's books were tendered in evidence. The system on which they were kept is described in the judgment of the Court as follows. "When any wood received from Alibagh was to be sold, a servant of the broker, named Khemji, went to the *bunder*, and made a memorandum of the quantity weighed and sold. He states that he did not necessarily see the weighing, but that the quantity of wood was certified to him by the weigher, by an agent of the contractor, and by the purchaser. The memorandum so made was taken by Khemji in the evening to the broker's shop, and an entry was made in the broker's accounts by his clerk Amalak." "The objection to the accounts taken by the Sessions Judge", the Court went on to say, "is that the entries in them were not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated." The English rule of evidence, of which the case of *Braun* v. *Presce* is the best illustration, is briefly and clearly stated in Mr. Fitzjames Stephens's Digest of the Law of Evidence: "A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty at or near the time when the matter stated occurred, and of his own knowledge." We concur with the Sessions Judge in thinking that this rule would exclude such accounts as those of the broker Ladak Haji. But the Indian rule of evidence (section 32, clause 2, and section 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business: and although it may be no doubt important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value, not the admissibility of the entries. In the present instance it appears to us that Ladak Haji's accounts were regularly kept in the course of business. When a clerk sitting in a Bombay office

keeps accounts of transactions effected at the *bunders* or the Cotton Green, he must necessarily make the entries, not from his personal knowledge, but from information supplied to him by some other person. The rule adopted by the Sessions Judge would exclude the accounts of half the merchants in Bombay. We have no doubt that Ladak Haji's accounts are admissible in evidence."

Under English law entries in the course of business must be shown to have been made *contemporaneously with the facts which they relate*, or they will be inadmissible. Amid the hurry and distraction of business, it is argued, the particulars of matters not entered at the time may be forgotten or misstated. The provisions of the Indian Evidence Act contain no similar restriction as to the *admissibility* of this kind of evidence; but, in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact which it relates. The sale of a valuable Cashmere shawl might be entered a day or two after without any risk of error, while a retail shop-keeper would have some difficulty in remembering on the following morning the particulars of a couple of dozen articles sold at different prices - this single transaction being one of fifty or a hundred similar sales made on the same day. Even under English law, the question whether the evidence was sufficiently contemporaneous to be admissible is one to be decided with reference to the circumstances of each particular case. Under the provisions of the Indian Evidence Act, not the *admissibility*, but the *weight* of the evidence, will depend upon the same circumstances.

Entries made in the course of business are, under English law, evidence only of those things which, according to the course of business, it was the duty of the person to enter, and are no evidence of *independent collateral matters*. In the case of *Chambers* v. *Bernasconi*,[9] Lord Denman, delivering the unanimous opinion of the Exchequer Chamber, said—"We are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting *facts necessary to the performance of a duty*, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." This restriction on admissibility also is not to be found in the Indian Evidence Act. The statement or entry, in order to be admissible under the Act, must relate to a *relevant* fact; and it would appear to make no difference, so far as the question of *admissibility* is concerned, whether this fact is connected with the performance of a duty, or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact, the statement of which was matter of duty; and whether this connection was such as to raise a presumption of accuracy of information or observation, must,

[9] Crompton, Meeson, and Roscoe's Reports, 368; and see 1 Smith's Leading Cases, 330.

however, be questions of importance in estimating the *weight* due to such evidence when it relates to collateral matters merely.

An instance of an entry as to a collateral matter being admitted in evidence under the provisions of this clause is to be found in the recent case of *Zakeri Begam* v. *Sakina Begam*, I. L. R. 19 Calc. 689, L. R. 19 I. A. 157, decided by the Privy Council. In this case the plaintiff sued for her deferred dower, and an entry as to the amount of her dower entered in a register of marriages kept by the Mahomedan priest, since deceased, who celebrated the marriage, was held to be admissible and relevant as evidence of the sum fixed.

Before these statements are admitted it must be shown that the person who made them is dead, or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without an unreasonable amount of delay or expense; and the burden of proving this is on the person who wishes to give the evidence; see section 104, *post*, and the remarks, *ante* p 172. Evidence of the *ordinary course of business* will also be necessary, and, in connection with this, see Illustration (*j*) to section 114, *post*. Where the statement is a written one, evidence must be given that it is in the handwriting of the person alleged to have made it, and this may be done by calling a witness who saw him write it, or who is conversant with his handwriting. Sections 34 and 35, *post*, have a certain connection with the present subject. The distinction between the rule just treated of and the provisions of these sections will be pointed out in the notes to the latter, in which will be also found some description of certain books, &c., peculiar to the ordinary course of business in India.

Dakhilahs

It would not be very easy to give a detailed account of all the documents, receipts, &c., to which the provisions of the law may become applicable; but there is one kind of receipts, a few decisions relating to which may be usefully noticed in this place. I allude to *dakhilahs*, or receipts for rent, so common in the experience of judicial officers of all grades in India. In the case of *Kristbas Myti* v. *Ram Dhan Khoria*, (B. L. R. Sup. Vol. 658 7 W. R. 526) it was decided by a Full Bench of the Calcutta High Court, overruling certain previous decisions, that *dakhilahs* filed by a raiyat and not disputed or denied by his landlord, cannot be presumed to be genuine from such non-denial merely, but must be proved by legal evidence in the usual way. Approving of certain observations in a previous decision on the same subject. *Peacock C. J.*, further, however, remarked, that a raiyat cannot be expected in every case to summon all the agents of his landlord who gave him receipts; that, if he produces *dakhilahs* and swears that they are genuine documents which were delivered to him by the landowner or his *gomastah* (collecting agent), or gives other *primâ facie* evidence to show that they are genuine, whether for the purpose of proving that rent has been paid in a suit for arrears, or to prove that rent has been paid at a fixed rate for a certain number of years for the purpose of barring a landlord's claim to enhance, such *dakhilahs* are strong evidence, if the

landlord or his agent does not come forward to deny them. See also *Umesh Chandra Mukharji* v. *Bama Dasi*, 7 W. R. 15: *Ram Jadu Ganguli* v. *Lakhi Narain Mandal*, 8 W. R. 488: *Lachmipat Singh* v. *Jangali Kalyan Das*, 9 W. R. 147: *Odiat Zuman* v. *Mahiudin Ahmad*, 9 W. R. 241: *Lachmipat Singh Dugar* v. *Umanath Mandal*, 10 W. R. 490: *Kailash Nath Haldar* v. *Umanath Rai Chaudhri*, 11 W. R. 170: *Ganga Narain Das* v. *Saroda Mohan Rai Chaudhri*, 3 B. L. R. 230: 12 W. R. 30: *Raj Mahamed* v. *Banu Rasmah*, 12 W. R. 34: *Reazunnissa* v. *Buku Chaudhrani*, 12 W. R. 267: *Indra Bhushan Deb Rai* v. *Golak Chandra Chakravartti*, 12 W. R. 350: *Dumaine* v. *Uttam Singh*, 13 W. R. 462: *Bharat Rai* v. *Ganga Narain Mahapatro*, 14 W. R. 211: *Madhab Chandra Chaudhri* v. *Promothonath Rai*, 20 W. R. 264, and *Amir Baksh* v. *Yusuf Ali*, 22 W. R., 489.

In the case of *Queen* v. *Tarini Charan De* (9 B. L. R. App. 42) the prisoner was charged with forging a railway bill-of-lading and was tried at Calcutta. It was proposed to put in a letter from the consignor at Delhi to his partner in Calcutta advising the despatch of the goods; but it was held that such a letter was not a document used in commerce, &c., within the meaning of the above section. In *Abdulla Paru* v. *Gannibai*, I. L. R. 11 Bom. 690, a deed of conveyance, which purported to bear the mark of the defendant as vendor, was tendered in evidence. The defendant Gannibai, however, denied that she had ever put her mark to it. It was proved to be attested by Dajiba Pandurang Joshi, a deed-writer, who was dead, and it was manifestly all in his writing, including the words descriptive of the markswoman. The statement of the deed-writer that the mark was Gannibai's was therefore held admissible under section 32, clause (2) of this Act, no doubt on the ground that it had been made by him in the ordinary course of his business.

Statements against interest.

III. The admissibility of statements or entries *against the interest* of the person who made them is grounded upon the strong improbability of a man's saying or doing that which is opposed to his own interests. One of the leading cases on this subject is that of *Higham* v. *Ridgway*.[1] Here the question at issue was the exact age of one William Fowden, junior; and, in order to prove the date of his birth, the Court admitted as evidence an entry of having delivered his mother on a certain day, made by a man-midwife in one of his books, and proved to be in his handwriting, such entry referring to a ledger, in which a charge for attendance was made and marked—PAID.[2] It will be observed that the *date* was in no way against the interest of the person who made the entry, but was wholly collateral to that portion of the entry, *viz.*—'*Paid*,' which was against interest, as showing that a certain sum of money was no longer due and owing to such person.

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[1] See 2 Smith's Leading Cases, 318; and 10 East's Reports, 109.

[2] It may be observed that Illustration (*b*) is the case of *Higham* v. *Ridgway*, with the portion of the entry which was *against interest* omitted. It is intended to illustrate the rule as to *course of business*, not that as to statements against interest.

On this point Lord Ellenborough, in pronouncing judgment, said :—"It is idle to say that the word '*paid*' only shall be admitted in evidence without the context, which explains to what it refers : we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged." This case is, therefore, a direct authority that statements and entries against interest may be received as evidence of *independent and collateral matters, which though forming part of the declaration, are not in themselves against the interest of the declarant.* This principle was followed in *Lilanand Singh* v. *Lakhpati Thakurain*, 22 W. R. 231. The rule, however, has no application in the case of documents containing entries of independent matters, which have no connection with, and need not be read to explain, the entries which are against interest. Thus, in an account rendered by a steward containing on one side items charging himself with the receipt of certain moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries were held not to be admissible in evidence, unless where they were necessary to explain the charging entries or were expressly referred to by them.[3] In such a case in India, however, the provisions of section 34, *post*, must be borne in mind.

In several English cases it was held that the declarant must be shown to have had *a competent, if not a peculiar, knowledge* of the facts which formed the subject-matter of the declaration. In a later case,[4] however, it was decided that it was not necessary that the person should have his own knowledge of the fact stated; that, if the entry charged himself, the whole of it became admissible against all persons; and that the want of such knowledge went to the weight, and not to the admissibility, of the evidence. The absence of all restriction in the Indian Evidence Act shows that the principle here laid down has been adopted. It was also decided in England that it is not necessary, to the admissibility of this kind of evidence, that the declarant should have been competent, if produced as a living witness, to testify to the facts contained in the declaration; nor does it affect the reception of the evidence that these facts are provable by living witnesses, who might be called. Nor is it indispensable that written declarations should be in the handwriting, and bear the signature, of the declarant; but they will be received if they were written by him wholly or in part, though not signed; or, if signed by him, though written by a stranger; or, even though not written or signed by him, if proved to have been written by his authorized agent, or to have been adopted by him. The written statement is, however, inadmissible where there is no proof that it was either written, or signed, or authorized, or adopted by the person against whose interest it militates. Whether these statements will be admissible under the Indian Evidence Act, unless actually *made, i.e.*, written by the

[3] *Doe* v. *Bevins*, 18 Law Journal Reports, C. P. 128: 7 Common Bench Reports, 456.

[4] *Crease* v. *Barrett*, 1 Crompton, Meeson, and Roscoe's Reports, 925: 5 Tyrrwhit's Reports, 464.

declarant himself, may be doubtful, having regard to the words of the law, *viz.*: "Statements written or verbal, of relevant facts *made* by a person who is dead," &c. Where written statements are in the handwriting of the declarant, proof of the handwriting should be given in the usual way (see note to section 47, *post*). If, however, the entries are thirty years old, this proof *may* be dispensed with under the provisions of section 90, *post*.

The student should observe the distinction between statements against the interest of the person making them, which are relevant as admissions under section 18, *ante*, against such persons and his privies only, and the statements now under notice, which are admissible equally against strangers.[5] The *contemporaneousness* of the statement with the facts to which it relates, which, as we have seen (*ante*, p. 177) is a consideration of some importance in connection with statements made *in the course of business* has never been regarded as material in the case of statements *against interest*, the attention and care ordinarily given by men to concerns in which their interests are involved being supposed to be sufficient guarantee against inaccuracy. It is, however, easy to conceive cases, *e.g.*, that of a heedless spendthrift heir, who has just succeeded to an inheritance, in which these guarantees would be of little value. This is, however, a point concerned, not with the admissibility, but with the weight of the evidence. The same remark applies to the *amount* of interest involved, which is not wont to be very nicely weighed, but upon which the degree of attention likely to secure accuracy must materially depend.

Whether a statement by a party acknowledging the payment of money therein stated to be due to himself is admissible as a statement against interest, where *such statement is the only evidence of the charge of which it shows the subsequent liquidation*, is a question upon which the authorities under English law are conflicting. The reader will find the subject discussed in the work of Mr. Taylor, (§§ 609, 610: §§ 675, 676, 8th edn.,) who considers the preponderance of authority in favor of the admissibility of the evidence. There is nothing in the Indian Evidence Act to prevent the admission of these statements in the case just mentioned; but here, as elsewhere, any objection that may be made will go, not to the admissibility, but to the weight of such evidence. In connection with this point, it will be important to notice a class of statements which may appear to be admissible, either as being against interest or as having been made in the course of business. I allude to *indorsements of the payment of interest or of part of the principal* on bonds and similar documents.[6] Such indorsements, if made before the claim became barred by the law of limitation would be against the interest

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[5] It may seem scarcely necessary to observe that the statements referred to in all the eight paragraphs of section 32 are relevant against strangers.

[6] It is very common in India for bonds to contain a stipulation that all payments shall be endorsed thereon, otherwise that no allowance will be made therefor. Such a stipulation will not, however, be a bar to proof of payments not so endorsed (*Kali Das Mitra* v. *Tara Chand Rai*, 8 W. R. 316: *Girdhari Singh* v. *Lallu Kunwar*, 3 W. R. Mis. Ap. 23: *Narayanundin Patil* v. *Motilal Ramdas*, I. L. R. 1 Bom. 45).

of the payee, inasmuch as he would be unable to recover the sum so indorsed as *paid*, but, if they were made *after* the claim became so barred, they would be *for* and not *against the creditor's* interest, seeing that by admitting a small payment he would be enabled to recover the larger remaining portion of the debt. Whether, then, the indorsement is admissible as an entry against interest depends upon the question whether it was *bonâ fide* made before the claim became barred by limitation. Mr. Taylor (§§ 623—629: 690—696, 8th edn.), carefully discusses the subject, and contends that the indorsement ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it. In the case of *Rose* v. *Bryant* (2 Campbell's Reports, 321) Lord Ellenborough said: "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. Though it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable, whensover they may have been written, this would be allowing the obligee to manufacture evidence for himself ..... I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." When the first edition of this work was published, *part-payment of interest of principal* did not, under the Indian Law of Limitation (Act XIV of 1859), revive the right to sue for the remainder of a debt. The consideration of the present question was, therefore, of importance only in connection with a class of cases common in India, *viz.*: where a money-bond contains a stipulation that the sum secured thereby shall be payable by instalments, and that on default being made in the payment of any one instalment, the whole amount or the aggregate of all the instalments shall become due and payable. Default being made in the payment of one instalment, the cause of action in respect of the whole amount accrues, and limitation therefore begins to run. The obligee of a bond, which has become barred by limitation in consequence of the whole amount having become payable upon default to pay an instalment, may attempt to evade limitation by indorsing the payment of one or more instalments, such indorsement having the semblance of being against interest, but being in reality quite the contrary. In cases of this nature it is submitted that if the indorsement be offered as an *entry against interest*, it ought not to be admitted unless and until it is shown to have been made at a time when it was against the interest of the obligee to make it. According to the provisions of the Limitation Acts (IX of 1871 and XV of 1877), the period of limitation for a suit on a promissory note or bond payable by instalments, which provides that if default be made in payment of one instalment the whole shall be due, begins to run when the first default is made, *unless where the payee or obligee waives*

the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver (see article 75 of the second schedule). The creditor must prove a waiver, and to prove waiver it is not sufficient to prove a mere abstinence from suit (*Sethu* v. *Nayana*, I. L. R. 7 Mad. 377, and *Gopala* v. *Paramma*, I. L. R. 7 Mad. 583: *Cheni Bush Shah* v. *Kadam Mandal*, I. L. R. 5 Calc. 97: *Nobodip Chandra Saha* v. *Ram Krishna Rai Chaudhri*, I. L. R. 14 Calc. 397). Even under these Acts, therefore, it may be often to the interest of the obligee to offer proof of such endorsements, so as to make it appear that a debt in respect to which limitation has begun to run, is not barred.

Rule as to part-payment altered.

The rule that part-payment of interest or principal revives the right to sue for the remainder of the debt was first introduced in India by the Limitation Act, IX of 1871 (see section 21). The existing law, which differs in some particulars from that of England, is contained in section 20 of the last Limitation Act, XV of 1877, which enacts as follows.—"When interest on a debt or legacy is, *before the expiration of the prescribed period*, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,—or when part of the principal of a debt is, *before the expiration of the prescribed period*, paid by the debtor or his agent duly authorized in this behalf,—a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made: *provided* that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same." The express provision that the payment, whether of interest or principal, must, in order to create a new period of limitation, have been made *before the right to sue had become barred*, appears to require proof of the time of payment. Where the payment is of part of the principal, the *proviso* will in most cases afford a security against fraud,[7] but where the payment is of *interest* only, the remarks just made as to instalment-bonds appear to be equally applicable.

Four kinds of interest.

The *interest* to which the statement must be opposed, in order to be relevant, may be one of four kinds—(I) Pecuniary; (II) Proprietary; (III) Interest in escaping a criminal prosecution; (IV) Interest in escaping a suit for damages.

Statements made orally or written in accounts are the most common instances of the application of the rule to *pecuniary interest*, and this portion of the subject is sufficiently plain to require no further elucidation.

Statements against proprietary interest.

An instance of a statement opposed to the proprietary interest of the person making it is to be found in *Hari Chintaman Dikshit* v. *Moro Lakshman*, I. L. R. 11 Bom. 89, in which a Hindu widow had executed in

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[7] Even here, however, the question may arise, as the writing, though made by the payer, may be *undated*. In the case of written acknowledgments provided for by section 19 of the Limitation Act, oral evidence is expressly made admissible to prove the *time*. Section 20 contains no similar express provision, but oral evidence is here also without doubt admissible for the same purpose.

favor of one Balkrishna Dikshit a *varaspatra* (or deed of heirship). This deed was admitted in evidence under clause 3 of this section in a subsequent suit between the heir of Balkrishna Dikshit and a mortgagee of certain property covered by the deed, on the ground that it was manifestly against the widow's proprietary interest, as by it she divested herself of her widow's estate in the property. The most common statements with respect to *proprietary* interest, are those made by persons while in possession of land, explanatory of the character of that possession. Such statements, f in *disparagement* of the title of the person making them, are clearly against interest. They have been received to show the name of the landlord under whom the declarant held, the amount of the rent, and the extent and nature of the tenure. There ought to be some evidence that the declarant was actually in possession, since otherwise his declaration that he has an interest, though limited, may appear to be a statement rather in his favour than otherwise. A careful distinction must be drawn between statements made by an occupier of land in disparagement of *his own title* and those statements which merely go to abridge or encumber the estate or tenure itself. The holder of a rent-free tenure would be very unlikely to admit that the land was rent-paying, the holder of a protected tenure would be unlikely to admit that he was a mere ordinary raiyat; but a raiyat with a right of occupancy or holding at a fixed rent, might find it greatly to his advantage to admit an easement for the maintenance of an embankment which occupied but a small portion of his land, and that of other raiyats, while it secured them a good supply of water necessary for raising a profitable crop. It must, however, be observed that there is nothing in the Indian Evidence Act which makes the question of admissibility depend upon the distinction just noticed. Here, as elsewhere, any objection that may be made will go, not to the admissibility, but to the weight, of the evidence. The Courts in England admit statements made against proprietary interest as evidence not merely of the extent of the declarant's interest in the land, but also of any fact not foreign to the statement, and which forms substantially a part of it. The same rule will doubtless apply in India, but the fact must be a *relevant* fact.

Statement which exposes to criminal prosecution or suit for damages.

In the *Sussex Peerage* case[8] statements made by a deceased clergyman, who had married two persons, were tendered in evidence to prove the marriage, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him liable to a criminal prosecution while living. These statements were, however, rejected, Lord Brougham remarking thus—"To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most

[8] 11 Clark and Finnelly Reports, House of Lords, 103; and see also *Davis* v. *Lloyd*, Carrington and Kirwan Reports, N. W. 276.

monstrous and untenable propositions that can be advanced." Yet this proposition, thus pronounced monstrous and untenable by one who did perhaps more than any other single individual to break down the old barriers against *admissibility*, has come to find favour with more modern reformers, who have carried it into effect to an extent never even contemplated by those who argued and decided the *Sussex Peerage* case—the Indian Evidence Act making the statement admissible, not only if it expose to a criminal prosecution, but also if the interest of the declarant be liable to suffer in a much less serious way, by a suit for damages; and further, the statement is admissible not only when the grave has closed over the person who made it, but also, though he may be still living, if he cannot be found, or has become incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case appears to the Court unreasonable.

The words "would have exposed him" require some observation. They will no doubt be construed to mean "would have exposed him at the time that the statement was made." It could never have been intended that a statement made after the risk had passed away, as for example, after a suit for damages had become barred by limitation or after the expiry of the two years within which prosecutions for offences under the Indian Christian Marriage Act must be instituted (see section 76, Act XV of 1872), should be admitted merely because, if made some months or weeks earlier, it would have exposed to a criminal prosecution or to a civil suit for damages.

Statements giving opinion as to public right or custom or matters of general interest.

IV. We now come to statements giving the opinion of persons as to the existence of any public right or custom, or matter of public or general interest. The ground upon which these statements are admitted is thus explained by Mr. Taylor. The origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; in matters in which the community are interested, all persons must be deemed conversant; as common rights are naturally talked of in public, and, as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject; such concurrence furnishes strong presumptive evidence of truth; and it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share. In estimating the weight to be allowed to this evidence in particular cases in India, the applicability of these reasons to a different state of society may well be taken into consideration.

A distinction has been drawn under English law between the meaning of the terms '*public*' and '*general*,' the former being applied to that which concerns every member of the State, while the latter is limited to a lesser, though still a considerable, portion of the community, as for example, to the persons living in a particular district or neighbourhood. In matters strictly public, reputation from any one has been held receivable, while in matters of general interest the testimony of persons wholly unconnected with the place has been regarded as inadmissible. So far as *admissibility* is concerned, the Indian Act makes no distinction; but in estimating the weight to be allowed to the evidence in any particular case, it would make a wide difference whether the statement were that of a person living in the vicinity and therefore likely to have information, or that of a person living at a distance and not in the habit of visiting the neighbourhood. In connection with this point attention should be paid to the express words of the law—"of the existence of which, if it existed, he would have been likely to be aware." The Indian Evidence Act here follows English law. "It appears," says Mr. Taylor, "that competent knowledge in the declarant is an essential pre-requisite to the admission of his testimony; and, although all the Queen's subjects are presumed to have that knowledge in some degree where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required." (§ 346, § 611, 8th edn.) This particular evidence will, however, not be necessary when the statement is that of a person who may fairly be presumed to be acquainted with the matter in question, as for example, in England, of a copy-holder, who may fairly be presumed to be acquainted with the customs of the manor. It was at one time thought in England that proof of the exercise within the period of living memory of the right claimed was a necessary preliminary to the admission of this evidence; but that doctrine has been of late years overruled, and it finds no place in the Indian Evidence Act. It may seem scarcely necessary to remark that these statements are admissible against, as well as in favour of, a public right or custom, or matter of public or general importance, and this has been held in *Sivasubramanya* v. *Secretary of State for India*, I. L. R. 9 Mad. 285, in which it has been said on the authority of *Drinkwater* v. *Porter*, 7 C. and P. 181, that no distinction can be drawn between the evidence of reputation to establish and that to disparage a public right, and that on this point the Indian Evidence Act is in accordance with the rules accepted by the English Courts.

The statement declared by the Act to be relevant is a *statement which gives the opinion* of the person making it. The English rule, while it rejects evidence of reputation in regard to *particular facts*, receives it upon general points. All the members of the community have a common and general interest in public and general matters; but particular facts are likely to be known but to few individuals, and may be misrepresented or misunderstood by those who have not personal knowledge of them; while,

moreover, they may be connected with other facts, by which, if known, their effect might be controlled or limited or explained. Statements as to particular facts would appear to be equally excluded by the language of the Indian Act.

The statement, in order to be relevant, must have been made *before any controversy as to such right, custom, or matter had arisen*. Where there is no dispute or controversy, there is no reasonable probability of bias or other inducement to warp the truth; but once a dispute or controversy has arisen, no one, more especially of those who are interested, remains indifferent; he takes one side or the other, and opinions are hastily, often rashly, formed upon imperfect information. The commencement of the controversy does not mean the commencement of the suit, but the commencement of that dispute, which has ultimately led to litigation. Mr. Taylor deduces the three following propositions from the English decisions upon this portion of the subject; *first*, that declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes; secondly*, that they are admissible, if no dispute has arisen, though *made in direct support of the title of the declarant; thirdly*, that the mere fact of the declarant having stood or having believed that he stood in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. Under English law the controversy which excludes this evidence must have related to the *particular subject in issue*. A dispute as to other points connected with the same matter will have no excluding effect. For example, in a suit between a copy-holder and his lord as to whether a certain customary fine was *to be assessed by the jury* of the lord's Court, depositions in an ancient suit, where the controversy turned on the *amount* merely of this fine, were admitted. The words of the Indian Act "before any controversy as to such right, custom, or matter had arisen," may, however, be held to require a stricter interpretation, and to exclude the statement, when the controversy related to a different point, although connected with the same right, custom, or matter. The evidence will be excluded even though the former controversy were *between different parties*, or had reference to a *different property or a different claim*, if actual matters to which the statement relates were clearly under discussion in the former dispute; and it will be also excluded even though the persons who made the statement were at the time of making it *unaware of the existence of the controversy*. "If an enquiry were to be instituted in each case," said Sir J. Mansfield in the *Berkeley Peerage* case, "whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."

The following are a few examples, taken from English decided cases, of instances, in which these statements have been admitted:—Where the question related to a manorial custom; to the limits of a town; to the boundaries of a country and parish (when the evidence was offered to prove the boundaries of two private estates, it was rejected); to a right to claim tolls on a public road; to the fact whether a road was public or

private; to a right of ferry; to the fact whether land on a river was a public landing place or not. The evidence was rejected when tendered to prove that a person had a private right of way over another man's land.

The Indian decided cases furnish few examples; but one instance of the admission of such statements is to be found in the case of *Sivasubramanya* v. *Secretary of State for India*, I. L. R. 9 Mad. 285, which was a suit brought by a zamindar to recover certain forest tracts from Government on the ground that they were included within the limits of his zamindari. Both plaintiff and defendant in this case relied on certain *ayakut* accounts as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the zamindari limits or in the limits of Government villages. These accounts were accounts made for revenue purposes to show the sources of revenue in each village, and they gave the limits of the villages to which they referred. Inasmuch as they were from time to time prepared for administrative purposes by village officers, they were said to be admissible as evidence of reputation, provided they were produced from proper custody and otherwise sufficiently proved to be genuine. But a letter of a Collector containing a summary of the statements by zamindars as to the right of inheritance to a zamindari in the district was rejected as inadmissible.—*Ramalakshmi Ammal* v. *Sivananantha Perumal Sethurayer*, 14 Moo. I. A. 570: 12 B. L. R. 396. 17 W. R. 553.

Illustration (*i*) is taken from those parts of the country in which the village system still exists: it has long died out, if it ever perfectly existed, in Lower Bengal. Public rights or customs are little understood; and the order of the Government or of the executive head of a district is often accepted as conclusive concerning them. In large *zamindaries* questions, however, occasionally arise somewhat analogous to those which occur in manors in England, such for example as to the *zamindar's* right to take dues on the sale of trees (*Paul Rai* v. *Ram Dit Panday*, 1 N.W.P. Rep. 139): or to receive one-fourth of the sale proceeds in cases of involuntary sale, as in execution (*Bijnath Persad* v. *Mahomed Fazul Hossein*, 3 N. W. P. Rep. 204): or in case of a house sold privately (*Kalian Das* v. *Bhagirathi*, I. L. R. 6 All. 47).

It has been held that evidence of the nature referred to in clause 4 of this section is admissible to prove only a fact in issue and not a merely relevant fact (*Patel Vandravan* v. *Patel Manilal Chunilall*, I. L. R. 15 Bom. 365).

V. Statement as to relationship, made by person having special means of knowledge.

V. & VI. The fifth and sixth clauses of the section deal with the relevancy of two classes of statements which are usually treated by English text-writers under a single head in discussing the admissibility of certain kinds of evidence in *matters of pedigree*. It will be convenient to deal with the subject-matter of the two clauses in a single exposition; but before proceeding to do so, it may be well to draw attention to the distinction between the kinds of evidence to which each clause refers. The statement declared relevant by the *fifth* clause is a statement, relating to the existence of any relationship between persons,

alive or dead (the language imposes no restriction), as to whose relationship the person making the statement had *special means of knowledge*. The statement provided for by the *sixth* clause is a statement relating to the existence of relationship between *deceased persons only*. It is not necessary that it should have been made by a person who had special means of knowledge, but *it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait, or other thing on which such statements are usually made*. Both statements alike, in order to be relevant, must have been made *before the question in dispute was raised* (see *ante*, p. 187). The admission of this evidence is a further exception to the rule (section 60, *post*), which requires all facts to be proved by direct evidence *i.e.* facts which can be seen, by those who saw them; facts which can be heard, by those who heard them, &c.

VI. Statement as to relationship between deceased persons made in will, deed, &c.

Under English law, the declaration of an *illegitimate* member of the family would be inadmissible. The 47th section of the repealed Act (II of 1855) rescinded the English rule on this subject, and admitted the declarations *not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family*. The latter portion of this section would have included servants, friends, and neighbours, who are excluded under English law. The propriety of the extension of the rule at least to illegitimate members of the family cannot be doubted, having regard to domestic relations in the East; and the whole section was a strong instance of the tendency of modern reform, which, making *admission* the rule and *exclusion* the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases. The rule now laid down by the Indian Evidence Act is still more general in its terms than the above quoted section of the Act of 1855, which was directed merely to modify the strict rule of English law. It renders admissible the statements not merely of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense which, under the circumstances of the case, appears to the Court unreasonable, if such persons had *special means of knowledge* of the relationship to which the statement relates. Proof of this special means of knowledge will be a pre-requisite to the admission of the evidence, and this proof must be given by the party who wishes to give such evidence (see section 104, *post*). It is a moot point under English law whether the statement of a deceased person, asserting his own illegitimacy, can be received as evidence against third parties. It is, of course, admissible against himself and those who claim under him by a title derived subsequently to the making of the statement. With respect to his admissibility against

strangers, it is argued that he could know of his own illegitimacy only by information received from others; but, as a bastard is in the eye of the law *filius nullius* and has no relations, the hearsay must have been derived from strangers, and is therefore inadmissible. This argument has no application in India, where the hearsay not only of *relations* but also of *strangers*, if they have had special means of knowledge, is admissible. There would appear to be little doubt, therefore, that the statement of a deceased person asserting his own illegitimacy is relevant against strangers under the Indian Evidence Act. Under English law this evidence cannot be successfully objected to on the ground that it is *hearsay upon hearsay*, provided that all the statements come from persons whose declarations on the subject are admissible. Thus, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were; the declaration of a relative in which he asserted generally that he had *heard* what he stated; and even general repute in a family, proved by the testimony of a surviving member, have been admitted. It may be doubtful whether these statements could be admitted under the *fifth* clause of the section of the Indian Evidence Act. *Special means of knowledge*, having regard to the meaning usually given to these words, might be held scarcely to include opportunities of hearing that, of the truth of which the hearer had no personal means of judging. So far as the *sixth* clause is concerned, there is no restriction on admissibility. It is improbable that any person would insert in a solemn deed, will, &c., any matter, the truth of which he did not know or had not satisfactorily ascertained.

We have seen that, in matters of *public or general* interest, declarations as to *particular facts* are excluded. The same rule does not, however, apply here. "In cases of general right which depend upon immemorial usage," said Sir J. Mansfield in the *Berkeley Peerage* case,[9] "living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births and the like, from the necessity of the thing the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and the family transactions among the relations of the parties. Therefore, what is dropped in conversation upon such subjects may be presumed to be true."

Mr. Taylor expresses an opinion that this evidence must be *confined to such facts as are immediately connected with the question of pedigree*, and

[9] 4 Campbell's Reports, 415.

that declarations as to *independent* facts from which the date of a genealogical event may be *inferred*, will probably be rejected. In a question of legitimacy, turning upon the *time* of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, was tendered in evidence, coupled with proof of the time when her own child was born, for the purpose of fixing the alleged bastard's birth at a period subsequent to its parent's marriage. Mr. Baron Gurney admitted the evidence, but Lord Cottenham held it to be inadmissible. The suckling of the child had no *direct* bearing on its age or legitimacy, but was only a species of circumstantial evidence.[1] Where, however, the question issue related to the relative seniority of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus and Achaius, according to the order of the names in St. Paul's first Epistle to the Corinthians, for the purpose of distinguishing their seniority, and also declarations by an aunt, who was present at the confinement and with a similar object tied strings round the arms of the second and third child, were admitted, as bearing *directly* on the fact to be proved. It was once thought that these declarations could not be received to prove the *place* where any of the events of pedigree occurred, but this proposition has been doubted; and in *Shields* v. *Boucher*,[2] Vice-Chancellor Knight Bruce intimated a strong opinion that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Declarations by a deceased person, that "he was going to visit his family at such a place," have been admitted to prove a tradition in the family that they had relations who lived at that particular place. Evidence has also been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant. The language of the Indian Evidence Act—"When the statement relates to the existence of any relationship between persons, &c." may be interpreted to mean "relates *directly* or *indirectly*," and, if this interpretation be adopted, the principle of the above cases will doubtless be followed in India. To extend the admissibility of evidence is part of the scope of the new Act, and Illustration (*l*), would seem to indicate that it was not the object of the Legislature to exclude every portion of the statement, except that portion which bears directly upon the subject of actual relationship. The statement in the letter as to the existence of relationship might be wholly complete without any mention of the date of the child's birth.

It has, however, been held otherwise in *Bipin Bihari Daw* v. *Sridam Chandra De*, I. L. R. 13 Calc. 42. This was a suit on a promissory note to

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[1] Consider section 11, *ante*, if such a case arises in India.
[2] De Gex and Smale's Chancery Reports, 50, 56.

which the only defence was minority. It was proposed to prove a statement as to the age of the defendant made by his father who was dead, and which was admittedly made before legal proceedings were contemplated. It was held that the statement was inadmissible—"Illustration (*l*) to s. 32," it was said, "would be material in cases of pedigree; but the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. See *Haines* v. *Guthrie*, L. R. Q. B. D. 818."

There is one important restriction on the admissibility of this kind of evidence imposed by English law, but which finds no place in the Indian Evidence Act. The evidence is not admitted in every case in which the birth marriage, or death of a person forms the subject of controversy, but in those cases only which directly or indirectly involve some question of relationship, and in which the fact sought to be established is required to be proved for some genealogical purpose. Under the Indian Act the statement is admissible, provided it relates to a fact *relevant* to the case. It will in no way affect the admissibility of this evidence, that there are living witnesses who can depose to the same fact: nor is it necessary that the statements should have been contemporaneous with the events to which they relate. On this latter point Lord Brougham remarked that such a restriction would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.

There are few Indian cases under sub-sec. 5 of this section. It has, however, been held that a family priest is a person having special means of knowledge as to the relationship of the members of the family.—*Shamlal Singh* v. *Radha Bibi*, 4 C. L. R. 1(3; but a *mukhtar* is not: *Sangram Singh* v. *Rajan Bahi*, I. L. R. 12 Calc. 219: L. R. 17 I. A. 183. It has also been held that section 32, sub-section 5, does not relate to statements made by interested parties in denial in the course of litigation of pedigrees set up by the opposite parties.—*Naraini Kuar* v. *Chandi Din*, I. L R. 9 All. 467.

In connection with the present subject it may be well to make a few remarks about *family conduct*, which is usually treated as part of the subject by English text-writers. Such conduct has been admitted as evidence from which the opinion and belief of the family may be reasonably inferred. "If the father," said Sir James Mansfield in the *Berkerley Peerage* case, "is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." So the concealment of the birth of a child from the husband, the subsequent treatment of such child by the person who, at the time of its conception, was living in adultery with the mother, the fact that the child and its descendants assumed the name of the adulterer, and had never been recognized in the husband's family as his legitimate offspring, were held to be circumstances that went far to rebut the presumption raised by law in favour of the legitimacy of the issue of a married woman. This evidence will be admissible

in India under section 8, 9 or 11, *ante*, and under section 50, *post*. For examples of family conduct admitted as evidence, see the cases of *Muttusamy Jagavera Yettapa Naiken* v. *Venkataswara Yettaya*, 11 W. R. P. C. 6: 12 Moo. I. A. 203: *Rajendronath Haldar* v. *Jogendronath Banerji*, 14 Moo. I. A. 67 and *Pertab Narain Singh* v. *Subhao Koer*, I. L. R. 3 Calc. 626 1 C. L. R. 113 · L. R. 4 I. A. 228.

It remains to make a few additional remarks upon the *sixth* sub-section. The relationship, with which the statement is here concerned, must be relationship between persons deceased, and must also be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in some family pedigree, or upon some tombstone, family portrait, or other thing on which such statements are usually made. Bibles, prayer-books, missals, almanacs among Christians, and horoscopes among Hindus, are examples of other things on which such statement are usually made.[a] Horoscopes have, however, been held inadmissible in proof of age: *Ram Narain Kallia* v. *Mani Bibi*, I. L. R. 9 Calc. 613, and *Satis Chandra Mukhopadhya* v. *Mohendro Lal Pattak*, I. L. R. 17 Calc 849. Entries in a family Bible are admissible in England without proof that they were made by a relative. There is nothing in the clause of the Indian Act, now under notice, which requires that the statement in any of the things therein mentioned should have been made by a relative, or, indeed, which requires it to be shown at all by whom the statement was made. As to a will, see the case of *Nil Mani Chaudhri* v. *Zahirunissa Khanum* (8 W. R. 371), where the incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child. The published report of this case does not show whether the child was dead at the time the evidence was offered. If dead, the case is no longer law. As to a deed, see *Timma* v. *Darammu*, I. L. R. 10 Mad. 362, in which it was ruled that a statement as to relationship in a deed held to be invalid was admissible in evidence. With respect to *family pedigrees*, the Indian Act follows the principle laid down, after much discussion, in the case of *Davies* v. *Lowndes*.[b] The pedigree here traced the genealogy of the family from an almost fabulous antiquity down to the immediate contemporary relatives of the writer, and had the following memorandum at foot:—"Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to T. L. this 4th day of July, A.D. 1733, by his loving kinsman W. L." The Exchequer Chamber decided that part, if not all, of this pedigree was admissible as evidence on the ground that a pedigree made or recognized by a member of a family may be presumed to have been so made or recognized by him in consequence of his personal

[a] Whether *letters, correspondence*, &c., will be held to be so far *ejusdem generis* as to be included among "other things" may be doubtful. Their admissibility under clause 5 on proof of *special means of knowledge* is clear enough.

[b] 7 Scott's Reports, 21: 5 Bingham's New Cases, 167.

knowledge of the individuals therein stated to be relations, or of information, received by him from some deceased member, of what the latter knew or heard from other members who lived before his time. If, however, the facts rebutted this presumption and showed that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected, or at least so much of it as appeared to have been derived from improper sources.

Inscriptions on tombstones, mural and other funeral inscriptions, &c. may be proved by copies—see clause (*d*), section 65, *post*, and the definition of 'document,' section 3, *ante*.

Statement in document relating to transaction by which right or custom was created, recognized, &c.

VII. We have in the next place[5] to consider statements contained in any deed, will, or other document, which relate to any such transaction as is mentioned in section 13, clause (*a*), that is, any transaction by which any right or custom was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence. In the note to section 13 (*ante*, p. 100), it has already been pointed out that the word 'right' must be held to include *private* as well as *public* rights. It was for many years a disputed question in Westminster Hall whether hearsay evidence, or evidence of reputation, could be admitted to prove matters of private right or prescription; and the practice as to admitting or rejecting this kind of evidence varied on different circuits. In the case of *Didsbury* v. *Thomas*,[6] the question was whether a certain testator was, at the time of making his will and of his death, the owner of a certain farm called 'Meadow Farm.' It was alleged for the plaintiff that he was the owner, having purchased it of Sir J. S. and permitted his son Richard to occupy it until his (the testator's) death. Several witnesses gave evidence that one G. R., a tenant of Sir J. S., occupied the farm before Richard had it; that Richard took possession of it some sixty-one years before the trial, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time; and that the testator lived some ten years after his son Richard took possession. Another witness deposed that Richard took possession of and occupied Meadow Farm at the same time when his brother Edward occupied another farm called 'Foxlow's Croft,' and that both farms were *reputed* to be the property of Sir J. S. and to have been purchased from him at the same time by the testator. A deed was then proved, by which the testator had given to his son Edward the farm called 'Foxlow's Croft,' "which said farm," said the deed, "has been lately purchased amongst other lands and hereditaments by the said S. W. (the testator) of and from Sir J. S. &c." Objection was taken at the trial to the evidence of reputation, but the learned Judge was of opinion that, coupled with the deed, the evidence

[5] It may be observed that the statements made relevant by clauses 6 and 7 must be *written* and that the word 'verbal' at the commencement of the section has no application to these clauses.

[6] 14 East's Reports, 323; and see 2 Smith's L. C. 7th Ed. 500.

was admissible. He thought that as it was in proof that Sir J. S. was the landlord of the Meadow Farm when occupied by G. R. before Richard's occupation; and that, as the deed also proved that Sir J. S. was also the owner of Foxlow's Croft, and that the testator had purchased that amongst other lands and hereditaments from him; and, as it was also proved that both the sons took possession of their respective farms at the same time, there was a sufficient basis laid to admit reputation that those other lands and hereditaments referred to in the deed were the Meadow Farm. On a motion for a new trial, it was contended that though reputation alone in a matter of private right was not admissible, yet it was properly received when accompanied by the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proven, the contents of which were confirmatory of the reputation. It was, however, decided that the evidence had been improperly received.

In the case of *Morewood* v. *Wood*,[7] the question was whether the defendant had a prescriptive right of digging stones on the lord's waste. The plaintiff produced a *presentment* of the free-holders of the court baron of the manor, of which he (the plaintiff) was lord, which presentment contained the following item:—"If any person gets stone without leave of the lord of the manor, we pain him 10s." This particular presentment was proved to have been signed by the defendant's grandfather, under whom he claimed. Other presentments signed by strangers were offered as evidence of reputation; and parol evidence of reputation, that none but the lord had the right to dig stone, was also tendered. This evidence was rejected, and on a motion for a new trial, the Judges were evenly divided (two against two) as to its admissibility. One of those who held it admissible (*Buller, J.*) was, however, of opinion that the evidence ought not to be received, except a foundation were first laid by other evidence of the right. Three out of the four Judges thought, however, that such evidence might be given as to a *particular custom*, though not as to a *private* prescriptive right. In *Clothier* v. *Chapman*,[8] evidence of reputation of the boundary between two private estates was rejected. In the case of *Reg.* v. *The Inhabitants of Bedfordshire*,[9] the question was as to who were liable to repair a certain bridge, and parol evidence of reputation was admitted; but here the matter in dispute was one in which the public had some interest, and Lord Campbell, in his judgment, guardedly said, that that relaxation of the general rule ought not to be extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. The balance of authority seems to be in favour of the proposition that evidence of this kind is not admissible in England upon questions of mere private rights:[1] but it will appear from what has been said that a different principle has been followed in framing the Indian Act.

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[7] 14 East's Reports, 327n; 2 Smith's L. C, 7th Ed. 504.
[8] 14 East's Reports, 331n.
[9] 14 Jurist, 208; Ellis and Blackburn's Reports, 535.
[1] See 2 Smith's L. C., 7th Ed., p. 509,

It will be observed that the clause now under notice does not declare all reputation to be relevant, but that only which consists of statements contained in any deed, will or other document relating to any transactions by which any right or custom was *created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.* The clause, therefore, does not provide for the admissibility of *parol* evidence of reputation in the cases to which it applies. Of the documents which are admissible under this clause, judgments and decrees are not the least important. Upon this subject, see *ante*, pp. 100-106.

Another instance of a deed admissible under this clause is to be found in *Haronath Mallik* v. *Nittanand Mallik*, 10 B. L. R. 263, which was a suit to establish a family custom. The plaintiff offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint; the deed was executed before action by the plaintiffs and also by a plaintiff who had died after the institution of the suit and also according to the plaint by a considerable majority of the family, but the defendant was not a party to it. It was held that the deed was admissible in evidence on behalf of the plaintiffs, though they themselves could be called as witnesses, but that it was not entitled to any weight, and that the alleged custom must be proved *aliunde*.

Statements by a number of persons, expressing feelings or impressions.

VIII. Statements, written or verbal, made by a number of persons, and expressing feelings or impressions on their part relevant to the matter in question, are relevant and may be proved by the testimony of persons other than those who made them, when such persons are dead, or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable. Whether it must be shown that *all* the persons who expressed their feelings or impressions are dead or cannot be found, &c., before evidence will be admitted of what any one of them said, is a question which does not appear to have arisen. The leading case on the subject now under notice was that of *Du Bost* v. *Beresford*,[2] Here the plaintiff painted a picture, which he designated, "The Beauty and the Beast," and caused it to be exhibited for money, upon which crowds went to see it. The defendant went and hacked the picture to pieces. The plaintiff sued to recover the full value of the picture as a work of art, and compensation for the loss of the exhibition. The defendant alleged that the picture was a scandalous libel upon his brother and sister; and in order to show whether the painting was made to represent these persons, the declarations of the spectators, while looking at the picture in the exhibition, were admitted in evidence.[a] The question whether the evidence was admissible unless all the spectators were proved to be dead, does not seem to have been raised. Doubtless the

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[2] 2 Campbell's Reports, 511

[a] This case is *Illustration* (*u*).

difficulty, if not impossibility, of ascertaining the names of all the persons who expressed their feelings or impressions, and of calling them all as witnesses, will, in the great majority of cases, be held to occasion *an amount of delay or expense, which, under the circumstances of the case, will appear to the Court to be unreasonable.* Another instance of the admission of this kind of evidence was where, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness was allowed to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance.[4] The clause applies when a number of persons assembled together give utterance to a common statement which expresses the feelings or impressions in their minds at the time of making it. It has no application to the case of a Police-officer, who goes round and collects a great number of statements from persons in different places; nor can he be permitted to give the result of these statements as evidence.—*Queen* v. *Ram Dutt Chaudhri*, 23 W. R. Cr. 35. Reputation, and the declarations of the neighbourhood as to their impression on the subject, have been received in England as evidence of marriage, though not in criminal cases, where stricter proof is required. In the case of the *Queen* v. *Wazira* (8 B. L. R. App. 63: 17 W. R. Cr. 5) it was held that in a prosecution for enticing away a married woman under s. 498 of the Penal Code, evidence that the man and woman were living together was sufficient to raise the presumption that they were man and wife, and to throw upon the prisoner the burden of proving that they were not married. It would, however, appear from the published report of this case that there was other and direct evidence of the marriage:[5] and the authority of this case must now be taken to have been overruled by the Full Bench decision in *Empress* v. *Pitambar Singh* (I. L. R. 5 Calc. 566: 5 C. L. R. 597), in which it was held that, upon a charge of adultery, the marriage must be strictly proved. This decision was followed in *Empress* v. *Arshed Ali*, 13 C. L. R. 125; and *Empress* v. *Kallú*, I. L. R. 5 All. 233. See s. 50, *post*. The Indian Evidence Act, it will be observed, applies without distinction to civil and criminal cases.

In connection with the present section should be read clause 1 of s. 21 (*ante*, p. 130). "An *admission* may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32." An exception to this rule will be found in section 95 of The Cess Act, IX (B. C.) of 1880, which enacts that returns, filed by or on behalf of any

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[4] See *Reg.* v. *Vincent*, 9 Carrington and Payne's Reports, 275: *Redford* v. *Birley*, 3 Starkie's Nisi Prius Reports, 88.

[5] A curious discussion on the subject of offences against marriage in Eastern Bengal and the amount of evidence required by the Courts to prove the fact of marriage among Mahomedans will be found at page 479 and following pages of the *Supplement to the "Calcutta Gazette"* of the 26th March, 1873. It is remarkable that none of those who took part in the discussion made any reference to section 50 of the Evidence Act.

person in pursuance of the provisions of that Act, shall be admissible in evidence against him, but *shall not be admissible in his favour.*

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The general rule, both in civil and criminal proceedings, is that the evidence of the witnesses must be taken *in the presence of* the parties or their pleaders. Witnesses are *examined* by the party who calls them; *cross-examined* by the adverse party; and *re examined* by the former, if it be so desired (see section 137, *post*). I shall show presently that there are some exceptions to this rule, and that the evidence of witnesses taken otherwise than in the presence of the parties is admissible under certain circumstances. The present section is scarcely an exception, seeing that the evidence rendered admissible by it must have been given in a proceeding in which the adverse party was or might have been present, had he so desired. In order to the admissibility of the evidence it must be shown, *first*, that the witness was examined on oath or solemn affirmation, as required by the law for the time being in force. In connection with this point see section 80 *post*, and consider section 13 of "The Indian Oaths Act, 1873." *Secondly*

Prerequisites to admissibility

it must appear that the evidence was taken in a judicial proceeding or before a person authorized by law to take it.[a] This can be generally proved by the production of the original record; and see clause 7, section 57: section 80: and Exception 1, section 91, *post*. If the Judge or Magistrate, before whom the evidence was given, were acting without jurisdiction, he would not be *authorized by law* to take such evidence. (See *Empress* v. *Rami Reddi*, I. L. R. 3 Mad. 48.) *Thirdly*, it must be shown that the witness whose deposition it is proposed to give in evidence is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or that his presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable.—See *Harish Chandra Chakravartti* v. *Tara Chand Shaha*, 2 B. L. R. App. 4: *Queen* v. *Lakhan Santal*, 21 W. R. Cr. 56: *Bhubanmayi Dasi* v. *Ambika Charan Sett*, 23 W. R. 343: *Queen* v. *Prasanno Chandra Gosami*, 22 W. R. Cr. 36: *Queen* v. *Lakhi Narain Nagori*, 24 W. R. Cr. 18. The burden of proving these facts lies on the person who wishes to give the evidence (see section 104, *post*), and the grounds of the admission of such evidence should be fully and clearly stated to enable the High Court to judge of the propriety of its admission.—*Queen* v. *Maujan*, 20 W. R. Cr. 69. Under English law the evidence is admissible in civil cases when the witness is dead, or out of the jurisdiction of the Court, or not to be found after diligent search, or insane or permanently sick, or kept out of the way by the contrivance of the opposite party. In criminal proceedings, however, a much stricter rule is applied, and the deposition of a witness taken before a Magistrate or Coroner will not be rendered admissible by mere proof that the witness himself cannot be found after diligent search. In the case of *Empress* v. *Piyari Lal* (4 C. L. R. 504) the Civil Surgeon being examined on the 21st March deposed that Mr. C. was not then in a condition to attend Court and give evidence: that, perhaps, he would be able to give evidence without injury to himself in a week or so. The case for the prosecution closed on the 25th March. On the 2nd April, the same Civil Surgeon, being examined for the defence, said:—"I think, Mr. C. is now capable of giving evidence in Court without injury to his health." It was held that C.'s deposition was improperly admitted, as his illness was merely of a casual and temporary character, and that the word 'incapable' in the section of the Act must be interpreted to mean incapable from some cause which the evidence shows to be of a permanent character. In *Empress* v. *Asghur Hosein* (I. L. R. 6 Calc. 774: 8 C. L. R. 124) a doubt was expressed as to whether the incapacity must necessarily be a permanent incapacity, but a deposition was held to have been improperly admitted upon the evidence of persons to the effect merely that the witness was ill

[a] The British Consul at Zanzibar is authorized to take depositions, though he cannot enforce the attendance of the witnesses at Bombay. Depositions taken by him are admissible in evidence at a trial at Bombay for murder committed at Zanzibar, though the witnesses are absent—*Empress* v. *Dossaji Ghulam Hosein*, I. L. R. 3 Bom. 334.

and confined to his house. It was observed that the Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend.

Again, in *Empress* v. *Mulu*, I. L. R. 2 All. 646, it was said by *Straight, J.*, that the provisions of this section as to emergency are to be sparingly applied, and as the witness in that case, whose evidence before the committing Magistrate was tendered, was alive, and his attendance was reasonably procurable, it was held that his previous deposition was inadmissible. In another case, *Queen-Empress* v. *Burke*, I. L. R. 6 All. 224, the Sessions Judge admitted evidence taken during the enquiry before the Magistrate on the grounds that the attendance of the witnesses could not be procured without an expense of Rs. 500, an amount which he considered unreasonable; that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally, having reference only to the identification of the property in respect of which the accused was charged. The Allahabad High Court held in this case that the Sessions Judge had improperly admitted the evidence. Inconvenience to witnesses, it was said, was no ground allowed under s. 33 of the Evidence Act, and the question of identification was a material one. As to the ground of expense, it was impossible to consider the amount of Rs. 500 unreasonable under the circumstances of the case, considering that the entire case rested on the evidence of those witnesses, and that the accused had not cross-examined them, nor, looking to his position, could he arrange for their cross-examination.

Where a summons was taken out for service upon one J, who lived at a kachahhri house, but the peon in his return stated that he was unable to find him and serve him personally, and had hung up the summons in the kachahhri house; and there was evidence to show that J had suddenly disappeared from the kachahhri, and that inquiry had been made for him in his native village, but without result, it was held that J's deposition was properly admitted (*Empress* v. *Rochia Mahato*, I. L. R. 7 Calc. 42. 8 C. L. R. 273). The fact that a witness can be examined by commission would appear to be no bar to the admissiblity of his evidence under this section.

This section of the Indian Evidence Act applies alike to civil and criminal proceedings. Here and elsewhere, when it is proposed to give in evidence the deposition or statement of a person said to be dead, it will be well to bear in mind the provisions of sections 107 and 108, *post*, which deal with the burden of proof of the death of a person who has not been heard of for a long period. So much of the rule as admits the deposition of a witness kept out of the way by the adverse party is founded upon the broad principle of justice, which will not permit a person to take advantage of his own wrong.

Previous proceeding must have been between same parties or their privies.

The first proviso enacts that the previous proceeding in which the evidence was originally given must have been between the same parties or their representatives in interest. As to representatives in interest, see note to section 21, *ante*, pp. 131—133 and *Mrinmayi Debya* v. *Bhuban Mayi Debya*, 15 B. L. R. 5: 23 W. R. 42. In this

case it was held that the widow of a deceased Hindu, to whom a son had been adopted, did not represent the estate so as to be the *representative in interest*, within the meaning of this section, of a second adopted son whose adoption took place after the death of the first. As to the sons in a joint family governed by Mitakshara law claiming through their father, see the remarks of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (L. R. 7 I. A. 191 : I. L. R. 5 Bom. 48). The two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given : *Sitanath Das* v. *Mohesh Chandra Chakravartti*, I. L. R. 12 Calc. 627 Section 33 does not apply to a deposition of a witness in a former suit when the witness is himself a defendant in a subsequent suit, and the deposition is sought to be used against him, not as evidence between the parties, one of whom called him as a witness, but as a statement made by him which would be evidence against him, whether he made it as a witness or on any other occasion. Such a deposition is admissible under the sections relating to admissions, though it might be shown that the facts were different from what on the former occasion they were stated to be.—*Sujan Bibi* v. *Achmat Ali*, 14 B. L. R. App. 3 : 21 W. R. 414. The rule in this proviso depends upon the principle of reciprocity, it being reasonable that the right to use the evidence should be co-extensive with the liability to be bound thereby. It appears that it will make no difference that the parties are differently arrayed in the two proceedings—the plaintiff in the first proceeding being defendant in the second, or *vice versa*. The application to criminal proceedings of so much of the rule as admits the evidence against *representatives in interest* may require some consideration.

Adverse party must have had right and opportunity to cross-examine

The second proviso enacts that the adverse party in the first proceeding must have had the right and opportunity to cross-examine. This will prevent a co-defendant from using in a subsequent proceeding the evidence of a witness produced by another co-defendant. If the adverse party had both the right and the opportunity to cross-examine, it will not effect the admissibility of the evidence that he did not choose to avail himself thereof ; but in order to the admissibility of the evidence it must be shown that there were this right and opportunity.—*Queen* v. *Maujan*, 20 W. R. Cr. 69 : *Queen* v. *Etwari Dhari*, 21 W. R. Cr. 12. In another case, *Queen-Empress* v. *Ishri Singh*, I. L. R. 8 All. 672, six persons were, in 1874, named as having committed a murder. Five of them were arrested, and after enquiry before a Magistrate, were tried before the Court of Sessions and convicted. At the time of the enquiry before the Magistrate the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners under trial. In the Sessions Court the Judge did not record that the sixth person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886, the absconder was

apprehended and tried before the Court of Sessions on a charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions, given in 1874 before both the Magistrate and the Sessions Judge. But the Allahabad High Court held that these depositions were not admissible unde s. 33, the prisoner not having been a party to the former proceedings, and not having then had an opportunity of cross-examining the witnesses. With reference to this proviso it may be observed that if the adverse party had been permitted to cross-examine where he had not the *right* to do so (see section 165, *post*), it may be questionable if the evidence would be admissible. This proviso, too, would seem to preclude the depositions of witnesses in *ex-parte* probate proceedings from being used as evidence in subsequent contested proceedings relating to the same wills, even when those witnesses were dead or absent and their attendance could not be procured.

Questions in issue must be substantially the same.

The third proviso enacts that the questions in issue must be substantially the same in the first as in the second proceeding. "If the point in issue," says Mr. Taylor "though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded; and on this ground it has been held (though, perhaps, with questionable propriety) that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding." (§437; §468 8th ed.) A more liberal construction has been put upon the section of the Indian Act. The complainant died after his deposition had been taken by a Magistrate upon a charge of grievous hurt. In consequence of his death the accused was in the Court of Session further charged with murder and culpable homicide not amounting to murder. It was held that the deposition taken by the Magistrate was admissible upon the graver charges, and that the questions at issue before the Magistrate and the Court of Session were substantially the same. The act to be proved was the same whether the result were grievous hurt or death. It was observed that, in consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same (*Empress* v. *Rochia Mahato*, I. L. R. 7 Calc. 42: 8 C. L. R. 273). See also, as to the question in issue being substantially the same, *Empress* v. *Rami Reddi*, I L. R. 3 Mad. 48, in which it was pointed out that although the Act in using the word "questions" in the plural seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law. Whether a deposition taken in a civil case would be admissible a criminal case between the same parties or *vice versâ*, the section does not expressly say. The effect of the present proviso will be to exclude it in many cases. Whether the questions

in issue are substantially the same in the first and second proceedings, is a question which will occasionally require careful consideration. It is always an useful test to see whether the same evidence will prove the affirmative of the issue in both.

Section 288 of the Code of Criminal Procedure.

In connection with the present subject may be considered section 288 of the Code of Criminal Procedure, Act X of 1882, which is as follows :—"The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, *if such witness is produced and examined*, be treated as evidence in the case." The operation of this section should ordinarily be limited to cases in which a witness at the trial makes statements inconsistent with his deposition before the Magistrate—(*Queen* v. *Majohar Rai*, 24 W. R. Cr. 11). It gives the Court a discretion to accept the statements made by the witness before the committing Magistrate, notwithstanding that they are denied or that inconsistent statements are made at the trial, if the Court can feel satisfied from the evidence of the same witness or of other witnesses before itself that the original statements were the true ones. This discretion is to be exercised upon substantial and reasonably sufficient materials, and not upon mere speculation or conjecture (*Queen* v. *Amanula*, 12 B. L. R. App. 15 : 24 W. R. Cr. 49 : *Reg.* v. *Arjan Megha*, 11 Bom. H. C. Rep. 281). In the latter case it was further observed that the exercise of this discretion, considering it as a matter of fact or of law, is open to review in appeal. Before the evidence can be used in this way, it must, of course, appear that it was duly taken by the committing Magistrate in presence of the accused person,—(*Queen* v. *Nasirudin*, 21 W. R. Cr. 5) and that the accused had the right and opportunity to cross-examine : *In the matter of Dham Mandal*, 6 C. L. R. 53. In *Empress* v. *Dan Sahai*, I. L. R. 7 All. 862, it was said by *Straight, J.*, that this section of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Magistrate's record, and treat it as evidence before itself, and that at any rate a Judge was bound to put to the witnesses he proposed to contradict by their former statements the whole or such portions of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements. *In Queen* v. *Rangi*, I. L. R. 10 Mad. 295, and *Queen-Empress* v. *Bharmappa*, I. L. R. 12 Mad. 123, it has been held that depositions read under s. 288 of the Code of Criminal Procedure are not sufficient corroboration of a confession retracted at the trial ; while in *In the matter of Jayudin Paramanik*, 7 C. L. R. 66, and *Nanha Malla* v. *Empress*, 13 C. L. R. 326, it has similarly been doubted whether the deposition of an approver taken before the committing Magistrate can be used in the Sessions Court under s. 288 as evidence against his accomplices.

Evidence of medical witness.

Another instance in which evidence taken by the committing Magistrate may be used at the trial is that of a Civil Surgeon or other medical witness whose

deposition, taken and attested by a Magistrate in the presence of the accused—(*Empress* v. *Jhubu Mahton*, I. L. R. 8 Calc. 739 · 12 C. L. R. 233), may be given in evidence in any inquiry, trial or other proceeding under the Code, *although the deponent is not called as a witness.*

But to render the deposition of a Civil Surgeon or other medical witness admissible in evidence under s. 509, Code of Criminal Procedure, it must be shown to have been taken in the presence of the accused, and to have been attested by the Magistrate in his presence: the Court is not bound to presume under either s. 80, or s. 114, Ill. (*e*) of the Evidence Act that the deposition was so taken and attested · *Queen-Empress* v. *Riding*, I. L. R. 9 All. 720. *Queen* v. *Pohp Singh*, I. L. R. 10 All. 174: *Kachali Hari* v. *Queen-Empress*, I. L. R. 18 Calc. 129.

The Court may, however, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition (see section 509 of the Code of Criminal Procedure, Act X of 1882). If it does so, his deposition before the Magistrate is not absolutely inadmissible · *In the matter of the petition of Jhubbu Mahton*, I. L. R. 8 Calc. 746.

I have said above that there are some exceptional cases in which evidence is admitted against an accused person, although it was not taken in his presence, and although he had no opportunity of cross-examining. These cases are, however, few in number, and depend wholly upon necessity. Under section 510 of the Code of Criminal Procedure, any document purporting to be a report under the hand of the Chemical Examiner or Assistant Chemical Examiner to Government (but not one purporting to be the report of the "Additional Chemical Examiner,"—*Queen-Empress* v. *Autal Mucki*, I. L. R. 10 Calc. 1026) upon any matter or thing duly submitted to him for examination or analysis and report, in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The Court shall presume that the signature of any such document is genuine, and that the person signing it held the office which he professed to hold at the time when he signed it. (See clause 7 of section 57, *post.*)

Report of Chemical Examiner.

Under the provisions of section 512 of the Code of Criminal Procedure, if it be proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for a trial such person for the offence complained of may, *in his absence*, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him in the inquiry into or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Record of evidence in the absence of the accused.

So, in the case of *Queen Empress* v. *Ishri Singh* I. L. R. 8 All. 672, the facts of which have been already stated (*ante*, p. 201) the depositions given by the witnesses in 1874 before the Magistrate, though not those before the Sessions Judge, were held admissible in evidence.

Examination of absent witnesses by commission in civil cases.

In connection with the present subject certain provisions of the law for the examination of witnesses by commission may be adverted to. Sections 388 to 391 of the Civil Procedure Code provide for the issue of commissions for the examination of witnesses in civil cases. They may be issued (1) for the examination on interrogatories or otherwise of persons *resident within the local limits of its jurisdiction*, who are exempted under the Code from attending the Court, or who are from sickness or infirmity unable to attend it; and (2) for the examination of (*a*) any person resident *beyond the local limits of its jurisdiction*; (*b*) persons who are about to leave such limits before the date on which they are required to be examined in Court, and (*c*) civil and military officers of Government who cannot, in the opinion of the Judge, attend the Court without detriment to the public service. But evidence taken under a commission cannot be read as evidence in the suit without the consent of the party against whom the same is offered, unless (*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court; or (*b*) the Court in its discretion dispenses with the proof of any of these circumstances, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same (s. 390). These provisions as to the execution and return of commissions apply to commissions issued by (*a*) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council; or (*b*) Courts situate in any part of the British Empire other than British India; or (*c*) Courts of any foreign country for the time being in alliance with her Majesty (s. 391). As to the practice when witnesses are examined under a commission issued by the High Court on its Original Side, see *Pran Krishna Chandra* v. *Biswanath Chandra*, 8 B. L. R. App. 101 (Attorney cannot cross examine—commissioner must be sworn)[1]: *Dwarkanath Dutt* v. *Ganga Dayi*, 8 B. L. R. App. 102. (Use by one party of evidence taken under a commission issued at the instance of the other party.)

Commission to make local investigation.

Section 392 of the Code of Civil Procedure provides for the issue of commissions for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits. The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the

[1] But see Belchambers' Rules and Orders, p. 156.

evidence taken by him, is to return such evidence together with his report in writing, subscribed with his name, to the Court (s. 393). The report of the Commissioner and the evidence taken by him, but not the evidence without the report (*Debnarain Deb* v. *Kali Das Mitra*, 6 B. L. R. App. 70), are to be evidence in the suit and to form part of the record; but the Court, is not bound by the report (*Azim Serang* v. *Alimudin*, 17 W. R. 270), and either it or any of the parties to the suit with the permission of the Court, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation (s. 393). A report and measurement made by an Amin in one case are not admissible in another case without evidence of their accuracy afforded by the examination of witnesses in the ordinary way (*Dinabandhu Ghosh* v. *Nistarini Dasi*, 12 C. L. R. 50).[8] As to commissions to examine accounts, see note to section 34, *post*.

The examination of witnesses by commission in criminal proceedings is provided for by sections 503-507 of the Code of Criminal Procedure, Act X of 1882, which are briefly to the effect that whenever it appears to a Criminal Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Court may issue a commission to any District or first class Magistrate within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.[9] When the witness resides in the dominions

When attendance of witnesses may be dispensed with in criminal proceedings.

Issue of commission, and procedure thereunder.

[8] In the Bengal Presidency, Amins, or native commissioners employed under the provisions of Act XII of 1856, are usually at present deputed to make local investigations under the above provisions. The proper functions of an Amin appointed to make a local investigation will be found discussed in the following cases—*Ishwar Chandra Das* v. *Jugal Kishor Chakravartti*, 4 B. L. R. App. 33 : 21 W. R. 281 : *Sarat Chandra Rai Kanungo* v. *The Collector of Chittagong*, 2 B. L. R. App. 3 : *Gobind Chandra* v. *Rabutti Mani Chaudrani*, 2 Sevestre's Rep. 210 : *Ram Charan Mahtun* v. *Surabjit Mahtun*, 9 W. R. 494 : *Ambika Charan De* v. *Golak Chandra Chakravartti*, 9 W. R. 596 : *Bhairab Rai* v. *Nobin Rai*, 9 W. R. 601 : *Golak Chandra Kul* v. *Dukhi Ram*, 12 W. R. 209 : *Shadhu Singh* v. *Ramanugraha Lal*, 9 W. R. 83 : *Shusti Ram Pal* v. *Nabo Kanth Rai Chaudhri*, 14 W. R. 190 : *Brindaban Chandra Sirkar Chaudhri* v. *Nobin Chandra Biswas*, 17 W. R. 282 : *Kali Das Acharji* v. *Khetro Pal Singh*, 17 W. R. 472 : *Ram Dhan De* v. *Ram Mani De*, 21 W. R. 280 : *Krishna Chandra Gupta* v. *Brojo Mohan De Chaudhri*, 22 W. R. 183 : *Baroda Charan Basu* v. *Ajudhya Ram Khan*, 23 W. R. 286 : *Jagadamba Debi* v. *Rohini Debi*, 23 W. R. 422. See also *Jai Kumar* v. *Bandhu Lal*, I. L. R. 9 Calc. 363 : 12 C. L. R. 490, where the Moonsiff himself visited the locality.

[9] Under the similar provisions of section 76 of the repealed Act, X of 1872, the Bombay High Court made an order for taking by commission, before his departure from Bombay, the evidence of a Government servant, who had executed a recognizance to give evidence at the trial, but being ordered to a distant station on public duty, could not, with due regard for the public interests, return to Bombay for the trial (*Empress* v. *Bal Gangadhar Tilak*, I. L. R. 6 Bom. 285). But see *Empress* v. *Counsell*, I. L. R. 8 Calc. 896. In the case of *Faridunnissa* (I. L. R. 5 All. 92) it was sought, but unsuccessfully, to have a *pardanashin* lady examined by commission on the

of any Prince or State in alliance with Her Majesty in which there is an officer representing the British Indian Government, the commission may be issued to such officer.

Return of commission. Deposition may be read in evidence.

After any commission issued under the preceding provisions has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record. Evidence taken by commission cannot be read as evidence, unless the commission be issued by the Court itself, or unless it is admissible under section 33 of the Evidence Act.—*Empress* v. *Debi Prasad*, I. L. R. 6 Calc. 532. See also *Queen Empress* v. *Burke*, I. L. R. 6 All. 224: and *Queen-Empress* v. *Jacob*, I. L. R. 19 Calc. 113.

Cases connected with Merchant Seamen, &c., section 111, Act I of 1859.

Under the provisions of section 111 of Act I of 1859 (*An Act for the amendment of the Law relating to Merchant Seamen*), depositions made *in relation to the same subject-matter*, before any Justice or Magistrate in Her Majesty's dominions (including all parts of India other than those subject to the same Local Government as the port or place where such proceedings are instituted), or any British Consular Officer *elsewhere*, are, if authenticated by the signature of the Justice, Magistrate, or Consular Officer, declared to be admissible in evidence on due proof that such witness cannot be found within the jurisdiction of the Court: provided that, if the proceedings be criminal, such deposition shall not be admissible unless it was made in the presence of the person accused, and the fact that it was so made is certified by the Justice, Magistrate, or Consular Officer, of whose signature or official character, however, no proof is to be required.

"The Foreign Jurisdiction and Extradition Act, 1879"—Execution of Commission issued by Foreign Criminal Courts.

Under the provisions of section 19 of "The Foreign Jurisdiction and Extradition Act," XXI of 1879, the testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in the territory of any Foreign Prince or State in like manner as it may be obtained in relation to any civil matter under the Code of Civil Procedure, Chapter XXV (see *ante*, p. 205); and the provisions of that Chapter shall be construed as if the term 'suit' included a proceeding against a criminal: provided that nothing in these provisions shall apply in the case of any criminal matter of a political character.

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ground of *inconvenience*, if she were required to attend a Criminal Court. See also *in the matter of the petition* of *Basant Bibi*, I. L. R. 12 All. 69, and *contra*.—*Queen on the prosecution* of *Rukia Banu* v. *Roberts* (1 B. L. R. S. N. 5). *Nasrat Banu* v. *Mahomed Sayem* (18 W. R. 230): *in the matter of the petition* of *Haro Sundari Chaudhurain*, I. L. R. 4 Calc. 20, and *in the matter of the petition* of *Din Tarini Debi*, I. L. R. 15 Calc. 775.

13 Geo. III cap. 63, sections 39, 40, 41, 42, 44, 45.

Under the provisions of the 13 Geo. III cap. 63, any Governor-General, President, Governor, Chief Justice, Judge, or other person in the Civil or Military Service in India, may be tried before the Court of Queen's Bench, for any offence committed in India;[1] and the Court of Queen's Bench may award a writ of *mandamus* requiring the Chief Justice and Judges of the Supreme (High) Court in India to hold a Court for the examination of witnesses and receiving other proofs concerning the matters charged. Depositions so taken and returned shall be allowed and read; and shall be deemed good and competent evidence (section 40). Under the 42nd section, in all cases of proceedings in Parliament touching offences committed in India, it shall be lawful for the Lord High Chancellor or Speaker of the House of Lords, and also for the Speaker of the House of Commons, to issue his warrant for the examination of witnesses in the manner just described; and the depositions so taken and returned shall be good and competent evidence. Such depositions are not, however, to be allowed to be given in evidence in any capital cases other than such as shall be proceeded against in Parliament (section 45). Under the 44th section similar writs of *mandamus* may be awarded by the Courts at Westminster for the examination of witnesses, in suits both in law and equity, the cause of action in which has arisen in India, and which have been instituted by the East India Company.

21 Geo. III cap. 70, sections 5 and 6.

These provisions are, by the 21 Geo. III cap. 70, section 5, extended to the case of any person making a complaint to the Supreme (High) Court against the Governor-General of any oppression or injury, and entering into a bond to prosecute the same within two years in some competent Court in Great Britain.

24 Geo. III cap. 25, section 78.

Similar provisions are contained in the 24 Geo. III cap. 25, which provides for the trial before Special Commissioners, of British subjects holding offices or employments in India and charged with extortion or other misdemeanour committed in the East Indies.

42 Geo. III cap. 85, section 2.

Under the 42 Geo. III cap. 85, which provides for the trying and punishing in Great Britain persons holding public employment for offences committed abroad, the Court of Queen's Bench is empowered to award similar writs of *mandamus* for the taking of evidence, and the return of the same.

1 Geo. IV cap. 101.

The 1 Geo. IV cap. 101 provides for the issue of his warrant by the Speaker of either House of Parliament to the Judges of the Supreme (High) Courts for the examination of witnesses in India in cases of bills of divorce: and declares to be

[1] See also 10 Geo. III cap. 47, sec. 4; 26 Geo. III cap. 57, secs. 28 and 38; and 42 Geo. III cap. 85, sec. 3.

competent and admissible evidence in such cases the examination of witnesses taken and returned under the provisions of the Statute. As to divorce cases, see also *post*, p. 211.

6 & 7 Vict. cap. 94, section 4.

The 6 and 7 Vict. cap. 94, section 4, empowers any person having authority from Her Majesty in that behalf by warrant under his hand and seal to cause any person charged with the commission of any crime or offence cognizable by any Judge, Magistrate, or other officer within any such country or place as aforesaid (*i.e.*, out of Her Majesty's dominions), to be sent for trial to any *British Colony* (this includes British India; see 28 and 29 Vict. cap. 116) which Her Majesty may by an order in Council from time to time appoint: *provided* that, before any such person shall be so sent for trial, it shall be lawful for him to tender for examination to the Judge, Magistrate, or other officer having cognizance, *any competent witness or witnesses, the evidence of whom he may deem material for his defence, and whom he may allege himself to be unable to produce at his trial* in the said colony; and the said Judge, Magistrate, &c., shall examine the witness or witnesses and reduce the examination to writing, and shall transmit a copy thereof to the Supreme Court before which the trial is to take place, together with a certificate under his hand and seal of the correctness of such copy; and the Supreme Court is required to allow so much of the evidence so taken as would be admissible according to the law and practice of the Court, had the witness or witnesses been produced and examined at the trial before it, to be read and received as legal evidence at such trial.[2]

6 & 7 Vict. cap. 98.

The 6 and 7 Vict. cap. 98, passed for the more effectual suppression of the slave trade, extends the provisions of the 13 Geo. III cap. 63 to all cases of indictment or information laid or exhibited in the Court of Queen's Bench for misdemeanours or offences committed against the Acts for the abolition of the slave-trade, in any places out of the United Kingdom and within any British colony, settlement, plantation or territory.

39 & 40 Vict. cap. 46, s. 3.

Under the provisions of section 3 of the 39 & 40 Vict. cap. 46—*An Act for more effectually punishing offences against the laws relating to the Slave Trade*—every High Court in India has, for the purpose of obtaining evidence of the commission of offences relating to slavery or the slave-trade, and as respects the Princes and States in India in alliance with Her Majesty, and also as respects any British colony, settlement, plantation or territory wherein any witness may be, the same powers as are conferred on the Court of Queen's Bench by the 6 & 7 Vict. cap. 98, section 4: and every High Court

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[2] By section 23 of the Order in Council of the 9th August 1866 Her Majesty's Consul at Zanzibar may send to Bombay for trial any British subject charged with any crime or offence of which the Consul has cognizance, and the 24th clause requires the Consul, on any occasion of sending a prisoner to Bombay for trial, to observe the provisions of Stat. 6 & 7 Vict., cap. 94—*Empress* v. *Dossaji Ghulam Husein*, I. L. R. 3 Bom. 334.

may, if it thinks fit, issue such commission as is mentioned in section 330 (now section 503) of the Code of Criminal Procedure, to any Consular Officer of Her Majesty in the parts of Asia or Africa, specified in any Order of Her Majesty in Council under section 1 of the Act, or to any political officer or agent of the Governor-General of India in Council, or of any Indian Government in the said parts, or in the dominions of any Prince or State in India in alliance with Her Majesty, or to any Magistrate in Her Majesty's Indian dominions. And the depositions taken by virtue of the said powers or under such commission shall be deemed by every Court of original or appellate jurisdiction in India in any trial or proceeding under that Act or any Act of Parliament relating to slavery or the slave-trade to be as good and competent evidence as if the witnesses deposing had been present and examined *vivâ voce*, and had made oath or affirmation as required by law.

14 & 15 Vict. cap. 81, s. 6.

The 14 & 15 Vict. cap. 81, which empowers the Supreme (High) Courts at the Presidencies to direct the removal from India of lunatics and idiots when a guardian, keeper, or curator of any such lunatic or idiot has been appointed, declares it lawful for the proper officer of the Court to transmit a transcript under the hand and seal of the Chief Justice or Senior Judge, of the *proceedings* by which the idiocy, lunacy, or unsoundness of mind shall have been found, and by which such guardian, keeper, or curator shall have been appointed, to the Chancery in England and the Court of Session in Scotland and Chancery of Ireland respectively, as the case may require; and such transcript, when so received, shall be entered in the record of Court to which it may have been transmitted; and the record of any such proceedings shall, so far as the Lord Chancellor or Court of Session shall see fit, have the same force and effect, as if such proceedings had taken place in England, Scotland or Ireland, respectively.

18 & 19 Vict. cap. 104, section 15.

Under the provisions of *The Chinese Passengers Act*, 1855, any document purporting to be the written declaration of any British Consul or of the Commander of any of Her Majesty's ships of war, or to be a copy of the proceedings of any Court of Justice, shall, without any proof of signature, be received in evidence in legal proceedings taken under the Act or in respect of the bond therein required, if it appear that such copy or declaration, if produced in the United Kingdom, was officially transmitted to one of Her Majesty's Principal Secretaries of State, or, if produced in any colony, was officially transmitted to the Governor thereof.

19 & 20 Vict. cap. 113.

The 19th and 20th Vict. cap. 113, entitled *an Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals*, enacts that, where, upon an application for this purpose it is made to appear to any Court or Judge, having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous

of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and power is given to enforce their attendance, as also the production of writings or other documents. A certificate under the hand of the Ambassador, Minister, or other diplomatic agent of any Foreign Power, or in case there be no such diplomatic agent, then of the Consul-General or Consul of any such Foreign Power at London, that any matter in relation to which an application is made under the Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but, where no such certificate is produced, other evidence to that effect shall be admissible. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin, and the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession, who by any order of Her Majesty in Council may be appointed for this purpose, are declared, respectively, to be Courts and Judges having authority under the Act.

20 & 21 Vict. cap. 85, section 47.

The 20 and 21 Vict. cap. 85, section 47, confers upon the Court for Divorce and Matrimonial Causes created thereby all the powers given to the Courts of Law at Westminster by the provisions of the 13 Geo. III cap. 63, for enabling them to issue commissions and give orders for the examination of witnesses, and by all the provisions of any other Acts for enforcing the attendance of witnesses or otherwise applicable to the examination of such witnesses.

22 Vict. cap. 20.

The 22 Vict. cap. 20, entitled *an Act to provide for taking Evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals*, enacts that, where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such Court or tribunal, of any witness or witnesses out of the jurisdiction of such Court or tribunal and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly: and power is

given to enforce the attendance of witnesses as also the production of documents. This Statute contains other provisions similar to those of the 19 and 20 Vict. cap. 113, and the same Courts and Judges are declared to have authority under both enactments.

In proceedings under *The Extradition Act*, 1870, 33 & 34 Vict. cap. 52, depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements may, if duly authenticated, be received in evidence: and they shall be deemed to be duly authenticated, if authenticated in manner provided for the time being by law, or certified under the hand of a Judge, Magistrate, or officer of the Foreign State, where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require, and if authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State. And all Courts of Justice, Justices, and Magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof. The provisions of section 24 are similar, *mutatis mutandis*, to those of section 19 of the Government of India Extradition Act, XXI of 1879. See *ante*, p. 207.

33 & 34 Vict. cap. 52, sections 14, 15, and 24.

The Evidence by Commission Act, 1885, 48 and 49 Vict. cap. 74, amends 22 Vict. cap. 20, gives power to Courts to issue commissions to Courts in India or the colonies or elsewhere for the examination of witnesses in both civil and criminal proceedings, and provides that any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken before the Court which issued the commission.

48 & 49 Vict. cap. 74.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Entries in books of account when relevant.

Illustration.

A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

As a general rule, books of account are inadmissible in evidence in English Courts of Common Law, except in the particular cases of entries *against interest* or made in the *course of business* by persons dead and incapable of being called as witnesses. A different rule has prevailed in other countries; and even in England a tradesman's shop-book was in old

times admissible as evidence on his behalf. In America, entries made by the party himself in his own shop-books are admissible, if made contemporaneously with the facts to which they refer and forming part of the *res gestæ*. Under Roman law, the production of a merchant's or tradesman's account-books, regularly and fairly kept in the usual manner, was deemed to afford presumptive evidence of the justice of the claim. A similar principle has been followed in the laws of France and Scotland; and Mr. Taylor strongly recommended its adoption in English Courts of Common Law. It has been long admitted and acted upon in Courts of Equity. The Chancery Practice Amendment Act (15 & 16 Vict. cap. 86, section 54) empowered such Courts "in cases where they shall think fit, so to do, to direct that, in taking accounts, the books of accounts, in which the accounts required to be taken had been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

Section 43 of the old Act, II of 1855, was as follows:—"Books *proved* to have been regularly kept in the course of business shall be admissible as *corroborative*, but not as independent, proof of the facts stated therein." The above section of the Indian Evidence Act substitutes "regularly kept" for "proved to have been regularly kept." This, taken with the language of the illustration, "shows" (not "proves") "entries," may appear to indicate it as the intention of the Legislature that the principle of the section just quoted from the 15 & 16 Vict. cap. 86 is to be followed. So much of the rule as declares that entries in books of account shall not alone be sufficient to charge any person with liability, follows the Roman law under which such entries were deemed *semiplena probatio*, the suppletory oath of the party being admitted to make up the *plena probatio* (full proof) necessary to obtain a decree. For the practical application of this rule in India, see the following cases:—*Rai Sri Kishen* v. *Rai Hari Kishen*, 5 Moo. I. A. 432: *Seth Lakhmi Chand* v. *Seth Indra Mull*, 4 B. L. R. P. C. 31: 13 W. R. P. C. 36: 13 Moo. I. A. 365: *Dwarka Das* v. *Dwarka Das*, 3 N. W. P. Rep. 308: *Allyat Chinaman* v. *Jagat Chandra Rai*, 5 W. R. 242: *Gopal Mandal* v. *Nabo Kishen Mukhapadhya*, 5 W. R. Act X, 83: *Sorabji Vacha Gunda* v. *Kunwarji Manikji*, 1 Moo. I. A. 47: 5 W. R. P. C. 29. In this last case their Lordships of the Privy Council said:—"No evidence was brought before the Provincial Court or the Court of Sádr Diwani Adálat, which was not before the Zillah Court; so that the decree can only be supported by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable." In *Ganga Persad* v. *Indrajit Singh* (23 W. R. P. C. 391) they observed to the same effect: "The evidence, which the Subordinate Judge seems to have considered sufficient to prove the payments which the defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by the defendants that the items in those books were correct. Their Lordships are of opinion that, the books being (as is admitted) at most corroborative evidence, the mere general statement of the banker, wher

the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence." The above cases were decided under the old law, between the language of which and of the present section there is some difference. Under the former, books were admissible as *corroborative*, but not as independent, proof of the facts stated therein: under the latter, entries in books of account are *not alone sufficient* evidence to charge any person with liability, *i.e.* unless corroborated by other evidence (see *Balast Khan* v. *Ras Bihari Mukharji*, 22 W. R. 549; *Queen* v. *Hardip Sahai*, 23 W. R. Cr. 27). Account-books are *admissible* under this section, even though the entries in them were not made by, or at the dictation of, a person who had a personal knowledge of the truth of the facts stated. This is a matter, however, which may affect the *value* of the accounts as evidence (*Reg.* v. *Hanmanta*, I. L. R. 1 Bom. 610).

In *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Company*, I. L. R. 4 Bom. 576, one of the plaintiff's witnesses, named Khimji Thackersi, stated in cross-examination that he had formerly been employed by Cassumbhai Dhurumsi at intervals of a week or a fortnight, to make entries in his (Cassumbhai's) cash book relating to private transactions, which he, the witness, did from Cassumbhai's loose memoranda or from oral instructions given by Cassumbhai. This cash book was then tendered in evidence, but *West, J.*, refused to receive it and said: "Under section 34 of the Evidence Act I do not think this book comes within the designation of books of account regularly kept in the course of business. It is Cassumbhai's private account-book entered up casually once a week or fortnight, and with none of claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. These only are, I think, regularly kept in the course of business." Although the actual entries in books of account regularly kept in the course of business are relevant, the book itself is not relevant to disprove an alleged transaction by the absence of any entry concerning it.—*Queen* v. *Girish Chandra Banarji*, I. L. R. 10 Calc. 1024.

Under s. 198 of the Indian Companies Act, VI of 1889, however, when a company is being wound up, all books, accounts and documents of the company and of the liquidators are as between the contributories *primâ facie* evidence of the truth of all matters purporting to be therein recorded.

Jama-wásil-báki papers.

It may be useful to mention some of the books of account which are produced before the Courts in India, and which have formed the subject of judicial decision. In cases between landlord and tenant, and in suits for *wasilat* or mesne profits, *jamá-wásil-baki* accounts are usually offered in evidence. The decisions are not, however, altogether uniform as to the value which ought to be assigned to these papers. In the case of *Allyat Chinaman* v. *Jagat Chandra Rai* (5 W. R. 243) the Calcutta High Court (*Phear* and *Glover*, *JJ.*) remarked

as follows:—"But it is contended their allegations are corroborated by the *jamá-wásil-báki* papers filed by the respondent, in which the names of these raiyats are entered. Now, we observe that such a document, a private memorandum made for the zamindar's own use and by his own servants, must be looked upon with great suspicion, for nothing could be easier in a case like the present than to supplement defective oral evidence by the production of a document which could be manufactured at any time and to any required pattern. *Has then this document been attested?* We think not. Doubtless a person calling himself a Karkún's Muharrir has been produced to depose to Issur Chundra, the Tehsildar's, signature to this particular paper, but the Tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion, and that evidence has not been given." In the case of *Khira Maní Dasya* v. *Bejai Gobind Baral* (7 W. R. 533). *Norman, J.*, referring to this case, said:—"As to the value of *jamá-wásil-báki* papers as evidence in rent suits for the zamindar, the Deputy Collector quotes a passage from the 5th volume of the Weekly Reporter, page 243, and treats it as if the language applied to all *jáma-wásil-bákis*. But there is a wide distinction between the case with which the learned Judges were then dealing and to which they apply their remarks, and the present. Here we have a series of *jama-wasil-bakis* apparently regularly kept for ten years, with one gap, from 1249 to 1258. There is a single paper unattested, the writer of which was not called and his absence not accounted for. Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution; but there seems to be no reason why a series of collection accounts, or *jamá-wásil-báki* papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business."

In the case of *Gopal Mandal* v. *Nabo Kissen Múkhapadhya* (5 W. R. Act X, 83), *Seton-Karr, J. Macpherson, J.*, concurring) said:—"The Judge (of the Lower Court) alludes to the evidence of the gomashtahs who filed or attested certain papers of the zamindar. Such papers, we need hardly observe, cannot *incontestibly* prove variations in a raiyat's jamá, *unless it can be shown not merely that the jama-wasil-báki and similar papers show a varying rate, but that the raiyat has paid at a varying rate.*[a] Otherwise every raiyat would be at the mercy of a zamindar or his agents. The Judge says that the witnesses attest these papers, but he does not say how he considers the raiyats bound by them" — (but see *Sib Persád Dhobi* v. *Promothonath*

[a] The fact of the rate at which rent was paid having varied, was the fact sought to be proved by these papers in order to rebut the presumption in favour of a permanent tenure created by section 4, Act X of 1859. In *Belast Khan* v. *Ras Bihari Mukharji* (22 W. R. 549), decided under the Evidence Act, *jamá-wasil-báki* papers were held sufficient to rebut the presumption arising from twenty years' payment of rent at an uniform rate; but there was other evidence.

Ghosh, 10 W. R. 193.) In the case of *Ram Lal Chakravartti* v. *Tara Sundari Barmgnya* (8 W. R. 280) the same Judge said;—"*Jama-wasil-bâki* papers ought not to be regarded as any thing else than 'books proved to have been regularly kept in the course of business,' and these books, by section 43 of Act II of 1855, are 'admissible as *corroborative* but not as *independent* proof of the facts stated therein.' But in this case there is no independent proof adduced by the plaintiff of that which it was incumbent on him to prove in order to rebut the presumption found in favour of the defendant, and the *jamá-wásil-baki* papers consequently corroborate nothing, nor was the Judge legally justified in drawing from them the conclusions which he did draw." See, to the same effect, *Newazi* v. *Lloyd*, 8 W. R. 464: *Bijai Gobind Baral* v. *Bhiku Rai*, 10 W. R. 291: *Mahima Chandra Chakravartti* v. *Purno Chandra Banarji*, 11 W. R. 165: and *Bhagwan Dutt Jha* v. *Sheo Mangal Singh*, 22 W. R. 256. In *Sheo Shahi Rai* v. *Gudar Rai* (8 W. R. 328) *L. S. Jackson, J.*, said:—"It may be observed that *jamá-wásil baki* papers in a case of this kind" (suit for possession on the allegation of wrongful dispossession) "are really of very little consequence or value, as it is a matter of perfect case for either party in the suit to produce any number of such papers. It is even doubtful whether, under the terms of section 43, Act II of 1855, *jama-wasil-bâki* papers would be admissible even as corroborative evidence strictly speaking; certainly they are not independent evidence of any kind whatever, and therefore the absence of particular papers of that kind does not appear to be a very material omission." See also as to *jama-wásil-bâki* papers—*Gholam Muhammad Shah* v. *Banjuri Cheragi*, 7th August, 1847, S. D. A. Decis. Beng. 403.

Under section 34 of the Evidence Act *jamá-wasil bâki* papers have no weight except as corroborative evidence.—*Sarnomayi* v. *Johar Mahomed Nasyo*, 10 C. L. R. 543. The mere production of such papers is not enough. But coupled with other evidence they often afford a very useful guide to the truth.—*Roshan Bibi* v. *Hari Krishna Nath*. I. L. R. 8 Calc. 926. Taken by themselves, they are not admissible as independent evidence; but when a witness is called, and he refreshes his memory from them, they are not used as independent evidence, and to use such papers for such a purpose is perfectly legitimate.—*Akhil Chandra Chaudhri* v. *Nayu*, I. L. R. 10 Calc. 248. See also *Mahomed Mahmud* v. *Safar Ali*, I. L. R. 11 Calc. 407.

Jai-baki papers brought from the plaintiff's own possession cannot be used against a defendant without showing that he has in some way agreed to them.—*Baidyonath Parái* v. *Rasik Lal Mitra*, 9 W. R. 274.

"*Jamá-bándi* papers may be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of account under section 43, Act II of 1855. These papers were admittedly prepared by the zamindar's own agent in the absence of the raiyats; and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court in accepting every fact recited therein as true against the raiyats, no raiyat

Jamábandi papers.

in this country would be safe."—*Gajjo Koer* v. *Ali Ahmed*, 6 B. L. R. App. 62: 14 W. R. 474: to the same effect, *Chamarni Bibi* v. *Ayanulla Sirdar*, 9 W. R. 451: and *Naolas Kunwar* v. *Shiva Sahai*, 1 N.-W. P. Rep. Rev. App. 65.

In *Bhagwan Dutt Jha* v. *Sheo Mangal Singh* (22 W. R. 256) certain *jamábandi* papers prepared by a former *patwari* were produced in order to show the rent paid by the defendant during previous years. "Had the former *patwari*," said *Phear, J.*, "come forward as a witness and sworn that he had collected rent from the defendant at the rate shown in the *jamabándi*, and that the *jamábándi* was his own record of the fact, then this would have afforded very material evidence in support of the plaintiff's claim. But this man is not called, and his *jamá bándi* papers without him are valueless." *Jamá-bandi* papers for the year in respect of which the rent is claimed are no evidence of the landlord's right to the rent shown in these papers; but the evidence of the *patwari* as to the amounts collected in previous years, corroborated by the *jamá-bándi* papers of those years, may be conclusive (*Dhanukdhari Sahu* v. *Toomey*, 20 W. R. 142 *Kissor Das* v. *Parsan Mahtún*, 20 W. R. 171.) Where the raiyats signed a *jama-bandi*, they were held to be bound by it, their signatures thereto being regarded as an admission of the correctness of its contents (*Watson & Co.* v. *Mahendro Nath Pal*, 23 W. R. 436). Where increased rents were entered in the *jamá-bándi*, and it was not shown that the raiyats had recorded their assent thereto, they were held not to be bound by it (*Inayatullah Miah* v. *Nabo Kumar Sirkar*, 20 W. R. 207: *Riyazudin Mahomed* v. *McAlpine*, 22 W. R. 540). A *jama-bándi* prepared by a Deputy Collector engaged in settlement work under Reg. VII of 1822, is a public document within the meaning of section 74 of the Evidence Act.—*Taru Patur* v. *Abinash Chandrá Dutt*, 1. L. R. 4 Calc. 79. This, however, has been doubted in subsequent cases.—*Ram Chandra Sahu* v. *Bansidhar Naik*, I. L. R. 9 Calc. 741: *Akshai Kumar Datta* v. *Shama Charan Pattanda*, I. L. R. 16 Calc. 586.

Ism-navisi papers, or returns submitted by the Police in respect of lands held by *ghatwa's* and prepared in the ordinary course of business under the provisions of Bengal Regulations XVII, X, and XII of 1807, now repealed, are admissible in evidence, and may be entitled to some weight. They ought probably to be regarded as corroborative, but not as independent evidence (*Fergusson* v. *Government*, 5 R. C. & C. R. Civ. Rul. 179. 9 W. R. 158: *Farquharson* v. *Dwarkanath Singh and the Government of India*, 8 B. L. R. 504: 14 Moo. I. A. 259. See also *Erskine* v. *Government* 8 W. R. 232. Settlement *beheri* and *awargha* papers are corroborative evidence and nothing more (*Banwari Lal* v. *Forlong*, 9 W. R. 239). As to *hastabud* papers, see *Ram Narsingh Mitra* v. *Tripura Sundari Dasya*, 9 W. R. 105. As to *kanungo* papers, see *Khiro Mani Dasya* v. *Bijai Gobind Baral*, 7 W. R. 533: and *Nand Dantpal* v. *Tara Chand Prithibari*, 2 W. R. Act X, 13: *Dwarkanath Chakravartti* v. *Tara Sundari Barmani*, 8 W. R. 517. As to a *hath-chitta* book being *primâ facie* binding upon the vendor,

for whose security it is kept, see *Gopi Mohan Rai* v. *Abdul Rajá Sarjan Nakoda*, 1 Jur. N. S. 358.*

It has been a common practice in India to file in Court large account-books, when one or two entries only are needed for purposes of evidence; and the subordinate Courts have been in the habit of receiving these books in original, and sending them up to the Appellate Courts to the serious inconvenience of the Courts themselves and occasionally of the parties. In some cases, in which native banking firms or large *zamindars* were concerned, great numbers of account and other books were so admitted; and, when an appeal was preferred to the Privy Council, it became necessary to translate and print the whole of the contents of these voluminous books at an enormous expense to the parties concerned. The evil at length attained such a height that it called forth observations from their Lordships of the Privy Council. Section 62 of the Code of Civil Procedure now enacts that if the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with *a copy of the entry on which he relies*. The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and after examining and comparing the copy with the original and attesting the copy, if found correct, *shall return the book to the plaintiff and cause the copy to be filed*. The book itself should of course be in Court at the trial in case it should be necessary to prove the handwriting of, or refer to, the original entry. Section 141A further provides generally that if a document admitted in evidence in favour of any party be an entry in a shop-book or other account in current use, the party on whose behalf such book is produced may furnish a copy of the entry; and if such document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book of account is produced, the Co may

Account-books how to be produced in evidence.

* The following cases may also be consulted in connection with the use of account books in evidence in India, *viz.*, *Har Gobind Kadwasa* v. *Mohidin Kuli Khan*, 23rd November 1843, Bellasis' Rep. 48 (Proof of debt by account books): *Sardha Narain Rai* v. *Sohan Lal*, 8th February 1847, S. D. A. Decis. Beng. 45 (Accounts not at first produced and not supported by vouchers): *Ramgopal Mukhapadhya* v. *Rodgers*, 20th March 1847, S. D. A. Decis. Beng. 83: *Birjomohan Chaudhri* v. *Chandra Mani Saha*, 6th January 1848, 7 S. D. A. Rep. 423 (Mercantile accounts received for what they were worth, though neither signed nor attested): to the same effect—*Joalah Persad* v. *Muhammad Sadat Ali*, 1st May 1848, 3 Decis. N.-W. P. 130: *Ram Sahai Bhaggat* v. *Aodan Bhaggat*, 16th February 1848, S. D. A. Decis. Beng. 83 (*Khattas* must be verified): *Tulsiram* v. *Khosal Singh*, 24th December 1848, 4 Decis. N.-W. P. 337: *Ishan Chandra Singh* v. *Haran Sirdar*, 3 B. L. R. 135; 11 W. R. 525 (A Judge is bound to look at the whole of the entries, those on the credit and those on the debit side; to give credit to such of them as he believes to be true and to discredit those, if any, which he believes to be false): *Shah Gholam Nasaf* v. *Emanam*, 9 W. R. 275 (Income-tax papers held admissible against, but not in favour of the person whom they concern): *Durga Sundari* v. *Brindaban Chandra Sirkar Chaudhri*, 2 B. L. R. App. 37 (Lawazima papers): *Dwarka Das* v. *Janki Das*, 6 Moo. I. A. 88.

require a copy of the entry to be furnished. When a copy of an entry has thus been furnished, the Court shall mark the entry and shall then return the book to the person producing it.

I may observe that Mufassal practitioners too often show an inaptitude to deal with this particular kind of evidence; and (according to my experience) the valuable matter, which is occasionally to be found in books of account, is not utilized to the extent that it might be. They constantly produce in Court a vast mass of account-books, but do not point out the particular entries upon which they rely, to search for which I apprehend that industry is sometimes wanting. Where particular entries are believed to be relevant, it is the duty of those who rely upon them to point them out to the Court. A Judge has not time to search voluminous accounts in order to discover if they contain anything relevant to the case before him; nor indeed is it his duty to perform a work of preparation, which properly appertains to the parties concerned in the case. When it is intended to use in evidence something more than particular entries, the provisions of clause (*g*) of section 65 of the Evidence Act, and of sections 394 and 395 of the Code of Civil Procedure should be utilized. The former allows secondary evidence to be given of the existence, condition or contents of original documents when they consist of numerous accounts or other documents, which cannot conveniently be examined in Court, and when the fact to be proved is the general result of the whole collection. Evidence may be given as to this general result by any person who has examined them and who is skilled in the examination of such documents. Section 394 of the Civil Procedure Code enacts that, in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit, directing him to make such examination or adjustment. The Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination. The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite (section 395).

Evidence of account books how to be brought before the Court.

Commission to investigate and adjust accounts.

In consequence of the inconvenience felt in bringing Bankers' Books into Court, the Bankers' Books Evidence Act, XVIII of 1891, has now been passed. This Act is printed in the Appendix. The provisions of this Act are similar to those of 42 and 43 Vict. cap. 11, and make certified copies of entries in Bankers' Books *primâ facie* evidence of the existence of such entries, an admissible in evidence to the same extent as the originals. By Act I of 1893, the provisions of this Act have been extended to the Books of Post Office Savings Banks and Money Order Offices.

Bankers' Books

Relevancy of entry in public record, made in performance of duty.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

Mr. Taylor, speaking of *official registers* or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation, observes as follows, quoting from Starkie:—"These documents, as well as all others of a public nature, are generally admissible in evidence although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses." (§ 1429; § 1591, 8th edn.). "To render any document admissible in evidence as an *official register*, it must be one which *the law requires to be kept for the public benefit*." (§ 1430; § 1592, 8th edn.). Lord Denman rejected the register of shipping kept at Lloyd's as not falling within this rule; but this register has been admitted in other cases.

The following registers have been rejected:—A certificate filed at the Custom-house, which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage: registers of the baptisms and marriages performed at the Fleet and King's Bench prisons at May Fair and at the Mint in Southwark: a Jewish register of circumcisions kept at the Great Synagogue in London, &c. The registers of burials and baptisms formerly maintained by the English clergy, and in their absence by laymen at the stations in India, may, perhaps, be admissible, though they were not prescribed by any law, and the maintenance of them was scarcely an official act.[5] Where these registers are prescribed by local Municipal Acts, there can be no question of their being admissible. *Foreign* and *colonial registers* are receivable in England on proof that they are required to be kept, either by the law of the country to which they belong or by the law of England.

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[5] See, as to the books of baptisms, marriages and burials in India deposited at the office of the Secretary of State, *Ratcliff* v. *Ratcliff and Anderson*, 1 Swabey and Tristram's Reports, 467; and the Report of 1838 of the Commissioners for an inquiry into the state of non-parochial registers, p. 13.

The above section of the Indian Evidence Act follows and somewhat extends the English law on the same subject. The book, register, or record must be either a *public* or an *official*, one. The Act does not contain any definition of these terms, but in putting an interpretation on them reference may be made to section 74, *post*. Again, the entry must have been made by a *public servant in the discharge of his official duty*, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept. The Act contains no definition of the term "*public servant*," but see, as an aid to construction, the definition given in section 21 of the Indian Penal Code, Act XLV of 1860. It is not necessary to the admissibility of an entry made by a public servant in the discharge of his official duty that the register, &c., should be prescribed by law. The Codes of Civil and Criminal Procedure, the Revenue Laws and other enactments empower the High Courts, Boards of Revenue, and other controlling authorities to prescribe forms for registers, returns, &c. It may be said that such registers are really prescribed by law, inasmuch as they are directed in the exercise of authority conferred by law; but it may well be held to be the official duty of a public servant to maintain registers directed by his superiors without any such formal legal authority. In the case of persons *other than public servants*, however, the duty must be specially enjoined by the law of the country in which the book, register, or record is kept. These latter words contemplate foreign or colonial registers. The burden of proving that the duty is so enjoined will be on the person who wishes to give the entry in evidence (see section 104, *post*).

In England, it is essential to the admissibility of this evidence that the entries should have been made promptly, or at least without such long delay as to impair their credibility, and in the mode required by law, if any has been prescribed. The Indian Evidence Act contains no rule on these points, which may, however, be of importance in estimating the *value* of the evidence. In India as well as in England, the entry must have been made by a person whose duty it was to make it. The entry will be none the less admissible, even though the person who made it, being alive and capable of giving evidence, be not called as a witness.

As to the proof of the contents of public and official documents by certified copies or otherwise, see sections 76, 77, and 78, *post*.

The following are examples of books, registers, and records in India, which come within the purview of the above section:—Log-books (see sections 103—108, Act I of 1859, and sections 280—285 of the Merchant Shipping Act, 17 & 18 Vict. cap. 104)—Marriage registers (see sections 28, 32 and 54, and Schedules iii and iv, Act XV of 1872: 14 and 15 Vict. cap. 40; sections 14, 21, and 49 of the repealed Act V of 1852: the repealed Act XXV of 1864: section 44, Act V of 1865: section 6 and Schedule, of Act XV of 1865 (Parsees); and Act III of 1872)—Registers[6] directed by Part XI of

[6] See also the repealed Acts VIII of 1871, XX of 1836, XVI of 1864, XI of 1851, XVIII of 1847, IV of 1845, XIX of 1843, I of 1843, XXX of 1838.

the Indian Registration Act, III of 1877,—Registers of printing presses, newspapers, and books published in India, Act XXV of 1867—of copyright, Act XX of 1847—of new inventions, designs, patterns, &c., section 11, Act XV of 1859, Act XIII of 1872—of literary, scientific and charitable societies, Act XXI of 1860—of joint-stock companies, &c., under the Indian Companies' Act, VI of 1882[1]—*Ram Das Chakravartti* v. *The Official Liquidator of the Cotton Ginning Company, Ld., Cawnpore*, I. L. R. 9 All. 366—of British ships, section 4, Act X of 1841: 17 & 18 Vict. cap. 104—Registers prescribed by the various Municipal Acts—Proceedings of Registered Companies and Municipal Committees, recorded in accordance with the provisions of the particular Act applicable thereto—of vessels on the river Indus, Act I (Bom. C.) of 1863—Records of rights, section 14 of The Punjáb Land-Revenue Act, XXXIII of 1871, and sections 94—106 of The North-Western Provinces Land-Revenue Act, XIX of 1873—the Settlement Record, prescribed by clause 9, section 9, Bengal Regulation VII of 1822—Registers of Chakeran lands: *Collector of East Burdwan* v. *Imdad Ali*, W. R. 1684, 358. Quinquennial registers in the Bengal Presidency (*Udai Mani Debya* v. *Bishonath Dutt*, 7 W. R. 14: and see *Kashi Chandra Rai* v. *Nur Chandra Debya Chaudhrain*, 18th April, 1849, S. D. A. Decis. Beng. 113: Registers of tenures under the Chota Nagpur Tenure Act, II of 1869 B. C: *Kripal Narain Tewari* v. *Sukarmani*, I. L. R. 19 Calc. 91 (entry in Bhuinhari register admissible but not conclusive evidence)—Register of Mahomedan Marriages, Act I of 1876 (B. C.): *Khalim Ali* v. *Tazimunnissa*, I. L. R. 10 Calc. 607 (entry of special condition of wife's right to divorce husband admissible) Revenue registers in the Madras Presidency: *Baythamma* v. *Atulla*, I. L. R. 15 Mad. 19: Registers under the Bengal "Land Registration Act," VII (B. C.) of 1876,—as to the effect of entries in the registers under which Act, see *Ram Bhusan Mahto* v. *Debi Mahto*, I. L. R. 8 Calc. 853 (Entry is no evidence of title, though it may be of possession): *Saraswati Dyai* v. *Dhanpat Singh*, I. L. R. 9 Calc. 431: 12 C. L. R. 12: *Ram Mandar* v. *Janki Persad*, 12 C. L. R. 139 (an order under section 59 has the effect of dispossessing the person against whom it is made): *Omranissa Bibi* v. *Dilawar Ali*, I. L. R. 10 Calc. 350: (an order under section 55 has similar effect, but not an order under section 52). So, the statement made by a survey officer in a village register of lands that the name of a certain person was entered as occupant would be admissible, if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case: *Govindrav Deshmukh* v. *Rugho Deshmukh*, I. L. R. 8 Bom. 543: and the fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person: *Bhagoji* v. *Bapuji*, I. L. R. 13

[1] Under section 69 of the Act the register of members is *primâ facie* evidence of any matters by the Act directed or authorized to be inserted therein.

Bom. 75. An entry in the *paimaish* (survey measurement) accounts alone is not sufficient evidence to establish a right which is denied: *Keshavan* v. *Vasudevan*, I. L. R. 7 Mad. 297.

As to the effect of the entry of a tenure in the special register maintained under Act XI of 1859, see *Lakhi Narain Chattopadhya* v. *Gora Chand Gosami*, 12 C. L. R. 89 · I. L. R. 9 Calc. 116.

The reports of public officers, who have in the performance of their duty made inquiries and reported the result to the superior authorities, are often tendered in evidence in India. In the case of *Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (L. R. 1 I. A. 239), the question was as to the existence of a customary right in a certain zamindar to grant confirmation of the election of a mohunt: and certain *reports of former Collectors* on the subject were used as evidence. Under sections 10 and 11 of Madras Reg. VII of 1817, it was the duty of the Collectors to ascertain and report to the Board the names of managers of temples, the authority by whom they were appointed, the occurrence of vacancies, the claims of candidates and other matters. After noticing these provisions of the law, the Privy Council said —"Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers, made in the course of duty and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded upon them." In *Lekhraj Kuar* v. *Mahpal Singh* (I. L. R. 5 Calc. 744. L. R. 7 I. A. 63), entries in a *wajib-ul-arz* were held to have been properly admitted under this section to prove a custom, this custom being a usage such as Settlement Officers were required by Reg. VII of 1822 to ascertain and record (see *ante*, pp. 109, 110). In a suit for a fishery, an admission made by the defendant's predecessor in title in a written statement filed in a previous suit in the year 1818 was allowed to be proved by the production of the decree in such previous suit, it being the duty of the Court under the old practice to enter in the decree an abstract of the written statement (*Parbati Dasi* v. *Purnochandra Singh*, I. L. R. 9 Calc. 586. In *Byathamma* v. *Avulla*, I. L. R. 15 Mad. 19, a judgment was tendered in evidence as proof that in a particular instance the plaintiff's predecessor had acted in the capacity of a karnavan, and it was held, following *Parvati Dasi* v. *Purno Chandra Singh*, that this was a relevant fact and the entry admissible under this section. In *Thama* v. *Kondan*, I. L. R. 15 Mad. 378, a recital in a judgment in a previous suit, in which the defendants had made an admission of the plaintiff's lessor's title, wa held to be a relevant fact as evidence of title under the provisions of this section. In *Lilanand Singh* v. *Lakhpati Thakurain* (22 W. R. 231) the report of a Special Commissioner was rejected, but the published judgments do not show under what authority (if any) he was appointed. See, on the subject of the reports of

Committees of public departments in Foreign States, *Stupla* v. *Freccia*, L. R. 5 App. Cas. 693.

Measurement papers prepared by a Batwara Amin, do not come within the description given in section 35: *Mohi Chandhri* v. *Dhiro Misrain*, 6 C. L. R. 139. A certificate of guardianship is not evidence of the age of a person under section 35 of the Evidence Act: *Satischandra Mukhopadhya* v. *Mohendro Lal Pattak*, I. L. R. 17 Calc. 849. A "*Teishkhana*" register prepared by a *patwari* under rules framed by the Board of Revenue under section 16, Reg. XII of 1817, is not a public document, and the *patwari* preparing the same is not a public servant, nor has he any official duty: *Baij Nath Singh* v. *Sukhu Manton*, I. L. R. 18 Calc. 534.

Relevancy of statements in maps, charts and plans.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

There are two kinds of maps and charts here spoken of, *viz.*:—(1) published maps or charts generally offered for public sale, and (2) maps or plans made under the authority of Government. The admissibility of the first kind depends on grounds similar to those on which a Judge may refer to a dictionary for the meaning of a word or to a historical work for information on matters of public history, &c. (see penultimate paragraph of section 57; *post*). The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed: In the case of *Prahlad Sen* v. *Rajendra Kishor Singh* (2 B. L. R. P. C. 139: 12 W. R. P. C. 6) their Lordships of the Privy Council referred to "any good general map of India." It may be observed that this section goes somewhat further than English law, under which the maps of the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, were held inadmissible (*Swift* v. *McTiernan*, 2 Ir. Equity Reports, 632).

As to the second kind, the most important maps made under the authority of the Government of India are those of the great Trigonometrical Survey.

It will be important to notice some of the decisions of the Courts as to the admissibility and effect of the maps and papers connected with the survey. In the case of *Gopinath Singh* v. *Anandamayi Debya* (8 W. R. 167) *Bayley, J.*, said:—"The real point which we have to decide is, whether certain copies of *chitas*,—*i.e.*, measurement papers,—and copy of a field-book of the Survey Department (these copies being certified by the Collector as taken from the records of his office) are to be received as evidence or not . . . . . I am of opinion that these copies are evidence. In

the *first* place, I think that they are admissible in the same way that Her Majesty's Privy Council admitted attested copies of somewhat similar records on the grounds stated in page 137, Moore's Indian Appeals, Vol. VII.[8] In the *second* place, I think that, as these papers are the primary records out of which a survey map is made, they are originally component parts of the map, and that thus they are receivable under sections 11 and 13, Act II of 1855, as evidence of the fact of demarcation of lands and properties, measured and surveyed at or about the date of such map, and for the purpose of the State and of litigated questions respectively. Further, it may be noticed that, before these survey measurements and survey field-book and survey map are made, notices are issued under Regulations VII of 1822 and IX of 1825 to parties who wish to be present and watch that their interests are not prejudiced, so that that these records cannot be said to be made in the absence of the parties, for legally they were present when they had the opportunity of being present. *Lastly*, I think, under section 56, Act II of 1855, the records referred to are admissible, because public officers are not at liberty to give originals to parties; and certificated copies of such official records have always ordinarily been received in this Court as evidence, and acted upon in deciding cases. The whole current of decisions will show this up to that of the Full Bench, 7 W. R. 338.[9] I would therefore, receive these survey measurement papers and field-book.' *Markby, J.*, concurred.

In the case of *Ekkauri Singh* v. *Hiralal Singh* (11 W. R. P. C. 2: 2 B. L. R. P. C. 4) their Lordships of the Privy Council remarked as follows:—"To admit documents not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chitas* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them. The document on page 19 appears to be only a copy, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the *chitas* in general in questions between the *zamindar* and his tenants or *raiyats*, to receive them as evidence of boundary against a rival proprietor without further account, introduction or verification would, if it obtained as a practice—and each

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[8] The passage here referred to is in the judgment in the case of *Unide Rajaha Raja Venkataperumal Rauze Bahadur* v. *Pemmasami Venkatadry Naidu*, and will be found *ante*, in the note at foot of page 11.

[9] The case here referred to is that of *Kanhya Lal* v. *Radha Charan*, bearing on the subject of judgments *inter partes* and *in rem* (see note to section 41, *post*). An erroneous idea arose that the principles enunciated in this judgment were applicable to *tak-bast* maps or other similar surveys. In *Moti Lal* v. *The Rani, wife of Maharaja Bhup Sing Bahadur*, (8 W.R. 64) *Peacock, C. J.*, however, declared that there was no intention on the part of the Judges who delivered judgment in the case of *Kanhya Lal, &c.*, to lay down any rule as to the admissibility or otherwise of *tak-bast* maps.

relaxation is apt to become a precedent for another—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it." There is nothing to show what was the nature of the *chitas* here offered in evidence, save that, in the words of the judgment, they were offered *without further account, introduction, or verification.* In the case of *Sudakhina Chaudrain* v. *Raj Mohan Basu* (3 B. L. R. A. C. 381), *Rayley, J.*, referring to the above observations of their Lordships of the Privy Council, said :—"*There*, the Lords of Her Majesty's Privy Council speak of *chitas* as no evidence of title in boundary disputes between rival proprietors when they are without further account, introduction, or verification. But *here* are *chitas* and other documents which are shown by their character and attestation not to be at least fabricated documents, as pleaded by the special appellants, and to be supported by evidence. Besides, there is the Amin's report, and on the deputation of the Amin both the parties filed *chitas* and other papers of the same character before him in support of their respective allegations." *Hobhouse, J.*, taking the same view, said :—"By these words it seems to me their Lordships held that, if *chitas* are relied upon without any account given or verification made of them, then they are not to be considered as evidence; but here an account was given of the *chitas*, and they were properly introduced and verified, and therefore that remark of their Lordships does not seem to me to apply to the *chitas* now before us. They were, therefore, I think properly used as evidence in this case." It may here be observed that the reports do not always show what was the precise nature of the *chitas* offered in evidence in each particular case; and to this may be attributable some of the difference of opinion which seems to prevail on the subject in question. There is and ought to be a wide distinction, as regards both weight and admissibility, between the *chitas* and other measurement papers of the Revenue Survey of the country, designed and carried out as an executive act of State; the similar papers of a decennial survey made under the provisions of Act IX of 1847 (see p. 229); the *chitas* of a measurement of a particular *khas mahal* made by Government as zamindar (see *Janmajai Mallik* v. *Dwarkanath Mahanti*, I. L. R. 5 Calc. 287; 4 C. L. R. 574: *Ram Chandra Sao* v. *Bansidhar Naik*, I. L. R. 9 Calc. 741); the *chitas* of a measurement made by a private zamindar at a time when the relations between him and his raiyats were friendly; and the *chitas* of a measurement made by the same zamindar when disputes had arisen as to enhancement of rents. If the original records of the reported cases were examined with reference to this distinction, it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle. Where certain *chitas* were produced by the plaintiff as evidence of certain lands being *mal* or rent-paying, it was held that they were sufficiently attested by the deposition of the village gomashtah that they were the *chitas* of the village while he was gomashtah, and that he had been present when, with their assistance, a *purtal* (new, revised) measurement had been carried out in the village (*Debi Persad Chattopadhya* v. *Ram*

Kumar Ghosal, 10 W. R. 443). The *chitas* of the Government Survey have been always held admissible as evidence in cases in the Chittagong District (*Mahomed Fedai Sirdar* v. *Ozi-udin*, 10 W. R. 340). In this district the estates are very small, smaller than in most other districts in Lower Bengal, so that *khasra* or detailed measurement was largely resorted to by the Survey authorities. As to the value of these *chitas* the following observations were made in another case from the same district:—"I think also that there is nothing in the objection that the Judge was wrong in law in looking at the survey *chitas*. The Judge was in no way wrong in relying upon them to a certain extent as he did, as corroborating the other substantial evidence in the case. Of course the *chitas* would not have been evidencein themselves, if unsupported by other substantial evidence; but as there was other evidence, and the *chitas* were treated merely as corroborative, I think the appeal fails and must be dismissed."—*per Macpherson, J.* (*Arman Bibi* v. *Amiranissa*, No. 1294 of 1871, decided on 28th February, 1872, by the Calcutta High Court). In the following cases *chitas* of the Government survey were admitted: *Sarasati Dasi* v. *Ambika Nand Biswas*, 24 W. R. 192: *Mochiram Majhi* v. *Bissambhar Rai Chaudhri*, 24 W. R. 410.[1]

As to the value in evidence of survey maps and proceedings of the Survey authorities, there have been numerous decisions, not all quite uniform. In *Lalit Narain Singh* v. *Narain Singh* (1 W. R. 338) it was observed that survey proceedings are not conclusive as to title. To the same effect are the cases of *Thakur Bramma* v. *Thakur Lalit Narain Deo*, W. R. 1864, 120, in which case the dispute was regarding a right of fishery, and of *Kailash Chandra Ghosh* v. *Raj Chandra Bandopadhya* (12 W. R. 180), in which it was held that an award by the Superintendent of Survey is not conclusive evidence of a contested right in a regular suit. In *Mahomed Meher Chaudhri* v. *Sib Persad Sarmah* (6 W. R. 267) it was said — "The law requires the Revenue Authorities to survey and make *tak* according to possession, but it may happen that a party not in possession may succeed in obtaining a *tak* favorable to his interests and prejudicial to those of the party actually in possession, to set aside which the latter must be obliged to sue in a Civil Court. The Lower Appellate Court, by holding the survey map to be of itself conclusive proof of possession by the defendant, has attached much more weight to it than it legally deserved in a case like this, brought to show that it was wrongly prepared." The value of *tak* maps as evidence of possession will be found further discussed

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[1] The following cases relate to *chitas* and maps other than those of the Government Survey, *i e* made by *zamindars* or by Government in the capacity of a *zamindar*. —*Gopal Chandra Saha* v. *Madhab Chandra Saha*, 21 W. R. 29 (*Bawara chitas* no evidence between the *raiyats* of the zamindars): *Krishno Chandra Gupta* v. *Mir Safdar Ali*, 22 W. R. 326: *Sham Chand Ghosh* v. *Ram Kristo Behra*, 19 W. R. 309. *Janmajai Mallik* v. *Dwarkanath Mahanti*, I. L. R. 5 Calc. 287 · 4 C. L. R. 574, (a map prepared by an officer of Government in charge of a *khas mahal*, Government being an possession merely as a private proprietor, is not a map made under the authority of Government, and its accuracy is not to be presumed, but it is admissible in evidence under sec. 13).

in *Jaitara Dasi* v. *Mahomed Mobarak*, I. L. R. 8 Calc. 983: 11 C. L. R. 399; and *Nabo Kumar Das* v. *Gobind Chandra Rai*, 9 C. L. R. 305. In *Mahima Chandra Chakravartti* v. *Raj Kumar Chakravartti* (1 B. L. R. A. C. 5), *Peacock, C. J.*, said of an award and map made under Regulations VII of 1822 and IX of 1825:—"The award and the map do not *determine* the title of the parties, nor are they evidence of title." This must, however, be understood with reference to the facts of that particular case, in which the award and the map were the very subjects of litigation. In *Kumodini Debya* v. *Purna Chandra Mukhapadhaya* (10 W. R. 300) it was said that, under section 13, Act II of 1855, Government survey maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down; further than this they are not evidence as to rights of ownership.

That survey maps and survey proceedings are good evidence of possession and in this way evidence, though not conclusive evidence, of title, is a proposition well supported by many decisions:—See *The Collector of Rajshaye* v. *Durga Sundari Debya*, 2 W. R. 210 · *Gaur Mani* v. *Hari Kishor Rai*, 10 W. R. 338: *Shashi Mukhi Dasya* v. *Bisseshari Debya*, 10 W. R. 343: *Prahlad Sen* v. *Budhu Singh*, 2 B. L. R. P. C. 111: 12 W. R. P. C. 6: *Ummat Fatima* v. *Bhajo Gopal Das*, 13 W. R. 50: *Gadadhar Banarji* v. *Tara Chund Banarji*, 15 W. R. 3: *Radha Charan Ganguli* v. *Anand Sen*, 15 W. R. 444: *Ram Narain Das* v. *Mahesh Chandra Banarji*, 19 W. R. 202: *Burn* v. *Achambit Rai*, 20 W. R. 14. *Radha Chaudhurani* v. *Giridhari Sahu*, 20 W. R. 243: *Narain Singh Rai* v. *Narendro Narain Rai*, 22 W. R. 296: *Kashi Kishor Rai Chaudhri* v. *Bama Sundari Debya Chaudhrain*, 23 W. R. 27 ("The survey award of 1855, if it was made relative to the land which is the subject of this suit, is unquestionably evidence *quantum valeat* as between the parties of the fact of possession on the part of the plaintiff at the date of the award"—*per Phear, J.*) · *Jagdish Chandra Biswas* v. *Chaudhri Zahur-ul-huq*, 24 W. R. 317 · *Pogose* v. *Mokund Chandra Sarma Sirkar*, 25 W. R. 36: *Charu* v. *Zobeida Khatun*, 25 W. R. 54 · *Mohima Chandra Rai Chaudhri* v. *Wise*, 25 W. R. 277: *Prasanno Chandra Rai* v. *the Land Mortgage Bank of India*, 25 W. R. 453. In *Ram Narain Das* v. *Mohesh Chandra Banarji*, 10 W. R. 202, the High Court (*Markby J.*) declined to lay down any rule as to whether or not these documents require corroboration from any other source.[2] In *Mohesh Chandra Sen* v. *Jagat Chandra Sen* (I. L. R. 5 Calc. 212) the High Court would not disturb the decision of a Lower Appellate Court, which had refused to regard as conclusive evidence of title a *talbast* map, which had been signed as correct by the predecessors in title of both the plaintiff and defendant. But see *Brajo Nath Chaudhri* v. *Lalmiah Manipuri*, 14 W. R. 391 · *Rama Nath Rai Chaudhri* v. *Kali Prasad Rai Chaudhri*, 18 W. R. 346: *Ganga Narain Chaudhri* v. *Radhika Mohan Rai*, 21 W. R. 115. In a recent case, *Syam*

[2] Survey proceedings and survey maps, being public documents, are of course provable by certified copies (see section 74—77, *post*).

Lal Sahu v. *Lachman Chaudhri*, I. L. R. 15 Calc. 353, in which it was contended that the lower Court had wrongly relied on a certain survey map as conclusive evidence of title, the High Court said: "We are not prepared to say that in no case can the evidence of survey maps be sufficient evidence of title. Each case must be decided upon its own merits. A survey map is evidence of possession at a particular time, the time at which the survey was made, and although evidence of possession at one particular time might not be sufficient in itself to raise a presumption that the land belonged to the estate at the time of the permanent settlement, yet, coupled with other evidence of possession, it might suffice to raise that presumption. Now, in the present case we gather that the land which has been decreed to the plaintiff is included within his estate both in the survey map of 1846-47 and in the Dearah Survey map of 1865-66, that is to say, it has been found to have been in his predecessor's possession as appertaining to the estate he has purchased at two periods separated by an interval of twenty years. We are not prepared to say that this was not sufficient evidence from which the Subordinate Judge might fairly draw the inference that the title lay with the plaintiff." In another case, *Syama Sundari Dasi* v. *Jagabandhu Sutar*, I. L. R. 16 Calc. 186, it appeared that in the year 1859, a *takbast* survey was made and maps prepared, and on the face of those maps appeared whatw ere admitted by the parties to be the boundary lines of the various estates at that time, and it was said that "if they were admitted to be so at that time, that is the strongest evidence that they were so at the time of the permanent settlement, because there is nothing to show that there has been any change in the physical features of the place, and the relative positions of the boundary lines from that time down to the time of the *takbast* survey . . . . We think, therefore, that the Subordinate Judge was wrong in giving no effect to this *takbast* map. It is not only evidence, but is very good evidence as to what the boundaries of the property were at the time of the permanent settlement, and also as to what they admittedly were in 1859."

In connection with the subject of the evidence afforded by proceedings of the Survey authorities, clause (*b*) of section 13, *ante*, must be borne in mind.

The Revenue Survey of Bengal was not made under any Act of the Legislature. Act IX of 1847, however, recites the fact of such a survey being made under the authority of Government; and section 3 of the same Act enacts that it shall be lawful for the Government of Bengal, in all districts or parts of districts, of which a Revenue Survey may have been or may hereafter be completed and approved by Government, to direct from time to time, *whenever ten years from the approval of any such survey shall have expired*, a new survey of lands on the banks of rivers, and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last survey, and to cause new maps to be made according to such new survey. Alluvion and diluvion are constantly going on through out the whole delta of Lower Bengal traversed by the various branches of

the great rivers Gange sand Bramaputra. The other sections of the Act declare the dates on which the Revenue Survey of certain districts shall be deemed to have been approved, and as to other districts that the approval shall be deemed to have taken place on such date as may be notified in the *Calcutta Government Gazette*: and provide for abatement of the Government revenue where diluvion has taken place, and increase thereof where alluvion has added to the area of the estate. See also Acts XXXI of 1858 and IV (B. C.) of 1868. Under the provisions of "The Bengal Survey Act," V (B. C.) of 1876, the Lieutenant-Governor may, whenever he thinks fit, order that a survey be made of the lands situated in any districts, or in any part of a district, or in any specified tract of country, and that the boundaries of estates, tenures, *mauzas* or fields be demarcated on the lands so to be surveyed. Surveys may also be ordered to be made under Chap. X of the Bengal Tenancy Act, under which revenue settlements are now generally made. See also section 189 (6) of the same Act.

Section 13 of the repealed Act II of 1855 was as follows:—"All maps made under the authority of Government or of any public municipal body, and not made for the purpose of any litigated question, shall *primâ facie* be deemed to be correct, and shall be admitted in evidence without further proof." To the same effect, but slightly different, is section 83 of the present Act—"The Court *shall presume* that maps or plans purporting to be made by the authority of Government were so made, and *are accurate*: but maps or plans made for the purposes of any cause must be proved to be accurate." This section is silent as to maps made under the authority of any public municipal body. As to the effect of the words "shall presume" see section 4, *ante*, page 89. Under the provisions of section 87, *post*, the Court *may presume* that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published. It may also be observed that the presumption provided for by section 90, *post*, will apply to a map or chart as well as to any other document, purporting or proved to be thirty years old.

Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or

the *Government Gazette* of any colony or possession of the Queen, is a relevant fact.

In the case of the *Queen* v. *Amiruddin* (7 B.L. R. 63: 15 W. R. Cr. 25), the the *Gazette of India* and the *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Government and certain Muhammadan fanatics on the frontier, were held to have been rightly admitted in evidence under sections 6 and 8 of the repealed Act, II of 1855, to prove the commencement, continuation, and determination of hostilities: and, under section 6 of the same Act, a printed letter from the Secretary to the Government of the Punjab to the Secretary to the Government of India was ruled to have been properly used as a document of reference (see penultimate para. of section 57, *post*) for the same purpose, though the letter (it was observed) was not evidence of the facts mentioned in detail by the writer thereof. In the subsequent trial of the Wahabi conspirators at Patna, the *Gazette* was used in evidence for a similar purpose. In another case, *Jotendro Mohun Tagor* v. *Brajo Sundari*, W. R. 1864, 50, the Government Gazette containing the advertisement of sale and a printed paper purporting to be the conditions of sale alluded to in the Gazette and issued from the Master of the Court's office in the name of the Master were admitted in evidence to prove the actual conditions of the deed of sale. It may be observed that the section does not specifically mention recitals contained in the Bengal, Madras, and Bombay Regulations passed up to 1834, A.D.

The fact, as to the existence of which the Court has to form an opinion, must be *a fact of a public nature*. In connection with the present section may be read section 57 as to judicial notice of Acts, &c.; section 78, as to the mode of proving notifications and other official documents; and section 87, as to presumptions concerning Gazettes; as also "The Documentary Evidence Act, 1868," 31 and 32 Vict. cap. 37 (see note to section 78, *post*) and s. 7, Madras Act I of 1867, which makes a recital in any Act of the Governor in Council of a public nature *primâ facie* evidence of the fact recited.

Previous to 1863, the Government of India had no exclusive organ of its own, its notifications, orders, &c., being published in any of the Gazettes of the Local Governments, as was necessary. In that year the *Gazette of India* was first published as the Gazette of the Government of India exclusively; and Act XXXI of 1863 was passed to give to publication in the *Gazette of India* the same effect as publication in any other Gazette in which publication was prescribed by the law then in force.

Mr. Taylor, speaking of the admissibility and effect of public documents, observes that, "if their contents be pertinent to the issue, they will generally be admissible, as *primâ facie* or as conclusive proof of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory recital. Thus, where certain *public Statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued with

English law.

similar recitals and offering a reward for the discovery and conviction of the perpetrators these were held admissible and sufficient evidence of the existence of those outrages to support the averments to that effect in an information for a libel on the Government in relation thereto.[3] So a recital of a state of war in the preamble of a public Statute is good evidence of its existence, and the war will be taken notice of without proof, whether this nation be or be not a party to it.[4] So a recital of relationship, even in a *private* Act, has been received by the House of Lords as cogent evidence of a pedigree in a peerage case; because such recitals *used* never to be inserted in a private Act, unless their truth had first been ascertained by the Judges, to whom the bill had been referred. As, however, the evidence in support of private bills is no longer submitted to the Judges for approval, recitals inserted in them since this change in the practice would seem to be inadmissible; for, as a general rule, a local or private Statute, though it contains a clause requiring it to be judicially noticed, is not as against *strangers* any evidence of the facts recited; neither does it affect the public with a knowledge of its contents. The recitals, too, in a *public Act are not conclusive evidence;* and, therefore, where the schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false." (§ 1473. § 1660, 8th edn.)

Gazettes, as well as other newspapers, are frequently offered in evidence, with the view of fixing the adversary with the *knowledge* of certain facts advertised therein; but it is always advisable, and sometimes necessary, *unless the case is governed by a special Act*, to furnish some evidence, from which it may be inferred that the party affected by the notice has read it. This may be done by proving that the person has been in the habit of taking in the gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice. The *Gazette* containing *a notice of dissolution of partnership* is admissible, without any additional proof, against all persons who have had no previous dealings with the firm, though to those who have had such dealings the knowledge of such notice must be brought home, or proof be afforded of a special notice having been given by circular or otherwise; but see section 264 of the Indian Contract Act, IX of 1872.

Relevancy of statements as to any law contained in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain

[3] *Reg.* v. *Sutton*, 4 Maule and Selwyn's Reports, 532.
[4] *Reg.* v. *De Berenger*, 3 *id.* 67, 69.

any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

"Any country" will include India, England, and foreign countries. Books of reports have at all times been admitted in the Courts of a country as evidence of the law of that country, and here the section only acknowledges and legalizes the practice of the Courts. See Act XVIII of 1875, the Indian Law Reports' Act. But so far as *foreign* law is concerned, it is an innovation on the English Law of Evidence, which requires the laws, as well written as unwritten, and the usages and customs of *Foreign States*, to be proved by calling professional or official persons to give their opinions on the subject; and will not allow books of such law to be directly referred to, although, as in matters of science, the witness may refresh his memory by referring to text-books, decisions, statutes, codes, &c. It will be observed, however, that the books, in order to be admissible under the above section, must purport to be printed or published under *the authority of the Government* of such country; and must also purport to contain such law. Reports of rulings need not, however, be published under authority if only the book containing them purport to be a report of the rulings of the Courts of such country.

For other methods of proving foreign law, see section 45, *post*, and the note thereto: 6 and 7 Vict. c. 94. I. 3; 22 and 23 Vict. c. 63; and 24 Vict. c. 11. In connection with the present section read section 84, *post*, which enacts that the Court *shall presume* (see section 4) the genuineness of the books here mentioned.

How much of a Statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

"Though the whole of a document," says Mr. Taylor, "may at Common Law be read by the one party where the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in

an account-book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent, nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers or entries or letters. If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books *may* throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission, for such party is not bound to know whether they will or not; and moreover, the light may be a false one." The same rule prevails in the *case* of a *conversation*, in which several distinct matters have been discussed. It was at one time held that if a witness were questioned as to a statement made by an adverse party, such party might lay before the Court the whole of what was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit: yet a sense of the extreme injustice that might result from allowing such a course of proceeding has induced the Courts in later times to adopt a stricter rule; and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court. This was decided in the case of *Prince* v. *Samo*,[5] which was an action for malicious arrest for debt, the plaintiff contending that the money had been a gift, not a loan. A witness for the plaintiff acknowledged, on cross-examination, that he had heard the plaintiff admit on oath that he had repeatedly been insolvent, and had been remanded by the Court. He was then asked in re examination whether the plaintiff had not on the same occasion expressly stated that the money was *given* and not *lent*. The Court, in holding that the answer to this question was not evidence, observed, that if it were, "the jury would be bound to consider it, and might give full effect to it, and thus award large damages for an injury of which no particle of proof could be found but the plaintiff's own assertion:" and it was added that "the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."

A party may put in letters written by his opponent without producing or calling for the production of those to which they are answers, these latter being in the adversery's hands, who can produce them, if he thinks them necessary, to explain the transaction. If there be something written on the back by the person producing them, the other side is entitled to have the whole of it read. Where a defendant produced several letters between himself and the plaintiff, he was allowed to read his own reply to the last one, this being considered as part of an entire correspondence.[6] As to how much of an admission should be proved, see note to s. 31, *ante*, p. 162.

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[5] 7 Adolphus and Ellis' Reports, 627.
[6] See Taylor, §§ 661, 662 and 663; §§ 732, 734, 8th edn.

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

The law, by which a prior judgment, order, or decree prevents a Civil Court from taking cognizance of a suit, is contained in the Code of Civil Procedure, and the law, by which a prior judgment or order prevents a Criminal Court from holding a trial, is contained in the Code of Criminal Procedure. It has been already observed (*ante*, Introduction, p. 6) that most English writers deal with this subject under the head of *Evidence* as it is a branch of the law of estoppel, but the authors of the Indian Codes have regarded it as belonging more properly to the head of *Procedure*.[7] It is, however, proposed to explain in this note the rules prescribed by these Codes and the principles upon which these rules are founded, because it is necessary to understand these rules and principles in order to understand the above section of the Evidence Act and the other sections concerned with the use of judgments as evidence.

It is a settled principle that a matter, which has been put in issue, tried and determined by a competent Civil or Criminal Court, cannot be re-opened as between those who were parties to such adjudication, or their privies. This rule consists with justice to the individual, for *nemo debet bis vexari, si constat curiæ quod sit pro una eadem causa*[8]—and with public policy, for *interest reipublicæ ut sit finis litium*.[9] If matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion.[1] "If," said *Lord Kenyon, C. J.*, "an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvas the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment;" and again—"After a recovery by process of law, there must be an end of litigation; if it were otherwise, there would be no security for any person."

The rule and the reason for it.

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[7] See remarks of *Mahmud, J.*, in *Sitaram* v. *Amir Begam*, I. L. R. 8 All. 331.

[8] "No one ought to be twice harassed, if it be clear to the Court that it is for one and the same cause."

[9] "It is for the benefit of the State that there should be a limit to litigation."

[1] 2 Smith's Leading Cases, 777, note to *Duchess of Kingston's* case.

In the *Duchess of Kingston's* case, Sir *William De Grey, C. J.*, delivering the unanimous opinion of the Judges present, stated the rule in the following terms:[2]—"From the variety of cases relative to judgment being given in evidence in civil suits, these two deductions seem to follow as generally true:—*first*, that the judgment of a Court of *concurrent* jurisdiction *directly upon the point* is, as a plea, a bar, or, as evidence, conclusive *between the same parties upon the same matter* directly in question in another Court; *secondly*, that the judgment of a Court of *exclusive* jurisdiction directly upon the point is, in like manner, *conclusive upon the same matter between the same parties coming incidentally in question* in another Court for a *different* purpose; but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question though within their jurisdiction, nor of any matter *incidentally cognizable*, nor of any matter to be *inferred by argument* from the judgment." In the case of *Khagauli Singh* v. *Hossein Baksh Khan* (7 B. L. R. 673. 15 W. R. P. C. 30) the Lords of the Privy Council, having quoted the rule as stated by Sir *William De Grey, C. J.*, said:—"There is nothing technical nor peculiar to the law of England in the rule as so stated. It was recognized by the Civil law[3] and it is perfectly consistent with the second section of the Code of the Procedure[4] under which this case was tried." There is thus the very highest authority for applying to the decision of cases in India the principle laid down in the *Duchess of Kingston's* case.

Rule how stated in *Duchess of Kingston's* case.

This rule equally applicable to India.

I propose to deal first with the rule as applicable to civil cases. This rule is now embodied in the thirteenth section of the Code of Civil Procedure (Act XIV of 1882), which enacts as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Provisions of the present Code of Civil procedure as to *Res Judicata*.

"*Explanation I.*—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

"*Explanation II.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

"*Explanation III.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

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[2] 2 Smith's Leading Cases, 761.

[3] See Broom's Legal Maxims, pp. 321, 323, and the *exceptio rei judicatæ* of Roman Law there explained. See also Tomkins' and Jencken's Modern Roman Law, p. 94.

[4] *i.e.* of the first Code, Act VIII of 1859.

"*Explanation IV.*—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

"*Explanation V.*—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

"*Explanation VI.*—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

It will be convenient to consider these provisions under the following heads, *viz.*:—

I.—In order to have the effect of *res judicata*, the matter, directly and substantially in issue in the second suit or issue, must be the same matter which was *directly and substantially in issue*, in the former suit.

II.—Such matter must have been *heard and finally decided* by the Court in the former suit.

III.—The Court which decided such former suit must have been a Court of *jurisdiction competent to try such subsequent suit* or the suit in which such issue is subsequently raised.

IV.—The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim, litigating under the same title.*

I.—The former judgment is conclusive only upon the same matter. The section of the Code of Civil Procedure precludes the Courts from trying any suit or issue, in which the matter directly and substantially in issue was *directly and substantially in issue in a former suit*—the section does not say "*or* in an issue in a former suit"—between the same parties, and was heard and finally decided by a Court of competent jurisdiction. The question, whether the matter is directly and substantially in issue in the suit or issue to be tried, does not usually present any practical difficulty. But the question *whether the same matter was directly and substantially in issue in the previous suit*, is often one of great nicety. No precise rule of general applicability can be laid down for the solution of this latter question; and a true insight into the general principle is, I apprehend, to be obtained only by an examination of the decided cases. I propose therefore to examine, firstly the most important of the English cases, and, secondly, the Indian cases decided by the Privy Council and by the High Courts in India.

Former judgment conclusive only on same matter;

which must have been directly and substantially in issue in the former suit.

Case of the Duchess of Kingston.

In the *Duchess of Kingston's case* (1 Smith L. C. 760: How. St. Tri. 538) the following questions were put by the House of Lords to the Judges - (1) whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy: (2) whether, admitting such evidence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion. The unanimous opinion of the Judges was that the first question must be answered in the negative and the second question in the affirmative. The reasons for the first answer were that the Spiritual Courts had no jurisdiction in respect of crimes; that the parties were not the same, the King, in whom the trust of prosecuting public offences is vested, being no party to the proceedings in the Spiritual Court; that the sentence in the jactitation suit only proved that it did not yet appear that the parties were married; that such sentence was no proof of anything to be inferred by argument from it; and it was not to be inferred that there was no marriage at any time or place, because the Court had not then sufficient evidence to prove a marriage at a particular time and place. Sir *William DeGrey, C. J.* in delivering the opinion of the Judges, used the language already quoted, *ante*, page 236.

Outram v. Morewood.

In *Outram* v. *Morewood* (3 East, 346) the plaintiff declared against Morewood and Ellen, his wife, in trespass for breaking and entering a certain close and digging coal there. To this declaration the plea was a title derived by the defendant Ellen from certain persons to whom this and other coal mines had been bargained and sold by one Sir John Zouch. Morewood derived his title from his wife Ellen. She had been sued by the plaintiff in trespass for breaking and entering the same identical coal mine and had pleaded the above title, averring that the coal in the declaration in that action was part of the coal so bargained and sold. This averment had been traversed and issue found on the traverse. This issue had been found for the plaintiff, and judgment had followed thereupon. "The question," said *Ellenborough, C. J.*, "is whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring contrary to the title there found against the wife, that the coal mines now in question are parcel of the coal mines bargained and sold," as alleged: and the the decision of the Court was that they were estopped. His Lordship commented upon the authorities relied upon as sustaining the contrary doctrine, and showed that none of them negatived the conclusiveness of a verdict found on any precise point once put in issue between the same parties. "The cases," he concluded, "are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive, that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the

wife was a party, from averring that the coal mines in question are parcel of the coal mines bargained and sold by Sir John Zouch."

Barrs v. *Jackson.*

In Barrs v. *Jackson*[5] Lord Chancellor Lyndhurst held that the sentence of an Ecclesiastical Court in a suit for *administration*, which depended upon the question which of the parties was next-of-kin to the intestate, was conclusive upon this question in a subsequent suit in the Court of Chancery between the same parties for *distribution*. This judgment, which reversed a decretal order of Vice-Chancellor Knight Bruce, proceeded on the ground that the House of Lords had in a previous case decided that the Court of Chancery, in exercising its *concurrent jurisdiction* as to *distribution*, was concluded by sentences of the Spiritual Courts in granting *administration*, and was not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction. The judgment of the Vice-Chancellor, although reversed upon appeal, has been often quoted as containing a good statement of the law on the subject of *res judicata*. After examining the Roman Civil Law and the leading English authorities, the Vice-Chancellor expressed his opinion that "generally the judgment neither of a concurrent nor of an exclusive jurisdiction is (whether receivable or not receivable) conclusive evidence of any matter which *came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and object.* Referring to the previous case, he said:—"Lord Ellenborough certainly, and the Court of King's Bench, in *Outram* v. *Morewood*, decided most accurately with reference to the pleadings in that action at Common Law, that an allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram* v. *Morewood*, raised *as to the same property and for the same purpose* the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English Courts of Common Law and those of other Courts of Justice. But it is, I think, to be collected that the rule against re-agitating matter adjudicated is subject generally to this restriction,—that, *however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question: provided the immediate object of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object.* This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority." The learned Vice-Chancellor put numerous instances to show the injustice

[5] *Young* and *Collyer's* Chancery Cases, 585, and on appeal, 1 Phil. 582.

and absurdity that would in his opinion result from holding decisions on facts in proceedings between parties to be conclusive on those parties for all purposes.

Henderson v. Henderson.

In *Henderson* v. *Henderson*, (3 Hare, 100), the facts were as follows: The next-of-kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland against B, the brother and partner of the intestate, for an account of the estate of B's father and of the intestate, possessed by B, and for an account of the partnership transactions, and the dealings of B with the estate since the death of the intestate. The bill was taken *pro confesso* against B in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next-of-kin on the account of the estate of the intestate's father possessed by B; but that no account between B and the intestate had been laid before him. The Supreme Court decreed that the sums found by the Master to be due to the next-of-kin and the costs should be paid to them by B. The next of kin then brought actions in England against B upon this decree. Upon this, B filed a bill in the Court of Chancery in England against the next-of-kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts, and on private transactions: alleging various errors and irregularities in the proceedings in the Supreme Court of Newfoundland, and that he intended to appeal therefrom to the Privy Council and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to him be ascertained and paid, and the next-of-kin restrained by injunction from proceeding in their actions. A demurrer for want of equity was allowed on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland. The Vice-Chancellor said:—"The only question I have now to decide is, whether I am to consider the partnership account and the claim of Bethel (B) in respect of the private account as having been likewise the subject of adjudication by the Supreme Court in the island, or whether these items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the Master's report, and the other proceedings stated in the bill. In trying this question, I believe I state the rule of the Court correctly, when I say, that *where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case,*[6] *and will not* (except under special circumstances) *permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted*

[6] See Explanation II, *ante*, p. 229.

part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." The demurrer being allowed, with liberty to amend, the bill was not amended, and was therefore dismissed.

Hunter v. Stewart.

In *Hunter* v. *Stewart* (4 DeG. F. and J. 168) Lord Westbury said:—"In the year 1843, the plaintiff, together with his then partner, filed a bill in equity in the Supreme Court at Sydney, claiming to be admitted as a shareholder in the Company for the shares mentioned in the certificates issued to one MacLean and held by the plaintiffs. *The relief prayed was in substance the same (so far as relates to MacLean's certificates)* * *as the relief prayed by the present bill.* The answer of the Company's colonial directors insisted that the plaintiffs could not claim to be shareholders by assignment of shares, unless they had been accepted and approved of as such by the directors, and further that the Company had a lien on the shares included in MacLean's certificates for the debt due from him to the Company. The cause was heard on the merits, and the Court, on the ground, as it said, of want of privity, dismissed the plaintiff's bill. This decree is now insisted on as if it were pleaded as a bar to the present suit. The validity of the defence depends on the inquiry *whether the case made by the plaintiff in his present bill be the same with that stated in the former bill, or could have been given in evidence under the allegations which such former bill contained.* The conditions necessary for the validity of a defence of this nature are, in my opinion, best collected in a well-known passage from the commentary of *Vinnius* on the fourth book of

* MacLean mortgaged to the *British Colonial Bank and Loan Company* certain property in the Colony for the sum of £4,000. He received four printed certificates, each being a declaration that, on payment of £1,000, and on executing the deed of settlement of the Company, he would be entitled to twenty five shares of £40 each in the capital stock of the Company. A receipt for £1,000 was subjoined to each certificate, which had the following printed on its face.—"Notice of certificates sent to England and the names of parties to whom transmitted must be given to the manager at Sydney." To facilitate the sale of these certificates the Company kept printed blank forms of attorney, one enabling a person to be named therein to execute the deed of settlement in London in the name of the party to whom the certificates were granted, the other enabling a person to be named to receive the dividends and sell and transfer the shares as the attorney of the party in whose name by virtue of the first power the deed of settlement had been executed. The object of these powers-of-attorney was to enable any holder of the certificates at one and the same time to complete his title and sell or assign the shares. MacLean having obtained and signed two of these powers, sold and handed over the certificates and powers to Messrs. Duke & Co. at Sydney, by whom they were, in 1841, sold and delivered to the plaintiff's firm of *Hunter & Co. Lord Westbury, C.*, held that it was not competent to the Company to claim a lien on the shares represented by those certificates for any debt due from MacLean, to whom such certificates were originally issued. The Company were not chartered or formed under the provisions of any statute, and were, therefore, treated as an ordinary partnership of which Stewart and others were members.

the *Institutes*, and which is in these words:—*Exceptio rei judicatæ non aliter agenti obstat quam si eadem quæstio inter easdem personas revocetur, itaque ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.*[a] There are other passages in the forty-second book of the *Pandects* to the same effect. Admitting the identity of the two suits in other particulars, the question is, whether there was in the suit at Sydney and in the suit before me *eadem causa petendi*, that is to say, the same ground of claim or one and the same case for relief. The case of plaintiff in the present suit I have already described. It is an *equity derived from facts and showing a competent and authorized course of dealing pursued by the Company in the issuing of shares in the colony on the faith of which the plaintiff bought certain certificates, and which acts of the Company entitle him to claim to be admitted as a shareholder in respect of the shares included in such certificates, for otherwise the Company would be guilty of fraud.* The case made by the bill at Sydney consisted in substance of these allegations: *viz.*, that the Company were authorized to sell shares to persons in the colony; that MacLean purchased 100 shares for which he paid £4,000, and received four certificates, each for twenty-five shares, and immediately with the knowledge and sanction of the manager and solicitor of the Company at Sydney sold these shares to Messrs. Duke & Co. and delivered to them the certificates by whom the same shares and certificates were sold and delivered to the plaintiffs, Hunter & Co. And it was alleged that, by virtue of these transactions, inasmuch as the deed of settlement was in London and could not be executed, the shares had been well transferred to the plaintiffs; and further that the colonial directors had full power to transfer shares by entry in the books of the Company in the colony, and ought either to transfer the shares to the defendant De Salis (to whom the plaintiffs stated they had agreed to sell), or else to transfer the shares to the plaintiffs; and the bill alleging a pretence by the defendants that they were entitled to a lien on the shares for a debt from

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[a] "The *Exceptio rei judicatæ* bars every claim which may be adverse to the matter of the judgment *quotiens inter easdem personas eadem questio revocatur*. In respect to the requisites for the identity of a legal contention two things are needed—1. The *Exceptio* falls to the ground when no identity exists, even though the subsequent action may resemble the former one. 2. The *Exceptio* is maintainable where the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. In Personal Actions identity of right results from similarity of origin; but in Real Rights and in Real Actions, the mode of origin is immaterial. For example, a suitor has instituted the *Hereditatis petitio*, and has been nonsuited, upon which he proceeds by the *Rei vindicatio* for certain definite things. In this case the *Exceptio rei judicatæ* comes into operation. Thus the distinction between the whole and parts is irrelevant."—Tomkins and Jencken's Roman Law, p. 95. In order that the *Exceptio rei judicatæ* might be successful, there must, as a general rule, have been in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same persons suing in the same character. *Cum quæritur hæc exceptio noceat necne inspiciendum est, an idem corpus sit; quantitas eadem; idem jus; an eadem causa petendi, eadem conditio personarum; quæ nisi omnia concurrent, alia res est* (Dig. xlix. 2. 12 § 14). The French Code adopts the same rule (*Cod.* 1351).

MacLean charged that the *shares were not so liable inasmuch as they were sold by MacLean before any part of the debt became due, and that such sale was made with the sanction of Messrs. Wright and Turner, who were the sole representatives of the Company in the colony.* It is obvious that this case is entirely different from that which is set forth on the present record. The decision of the first does not involve the decision of the second. The rejection of the first case does not include or imply the negative of a single disputed proposition which is necessary for the support of the second. In the opinion of the Judges delivered in the House of Lords by Chancellor DeGrey in the *Duchess of Kingston's* case, it is said: 'The judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another Court.' But there has been *no judgment upon the matter stated in this present record.* One of the criteria of the identity of two suits in considering a plea of *res judicata* is the inquiry *whether the same evidence would support both.* But in the present case the evidence required to prove the allegations in the first bill would not sustain any of the material allegations in the second, and the evidence given in the second suit would not be receivable for want of proper allegation in the first. In equity the plaintiff must recover *secundum allegata et probata*, but here the allegations and equity of the one bill are different from the allegations and equity of the other. It may be admitted that the case made by the first bill was insufficient to bind the Company consistently with holding that the case made by the second bill is sufficient to bind the Company. And this is the result not of new evidence but of the allegation and proof in the second suit of an entirely different series of acts and conduct on the part of the Company. It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of institution of the first, and might have been then brought forward, and it may be said therefore that it ought not now to be entertained, but I find no authority for this position in civil suits,[9] and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit, seeking the same relief but stating a different case giving rise to a different equity. I must, therefore, dissent from the judgment of the Vice-Chancellor. I cannot hold that the degree dismissing the bill in the Court at Sydney is conclusive as against the right of the plaintiff in the present suit. The Vice-Chancellor seems to found his conclusion, as to the extent and effect of the decree at Sydney, in some decree upon the language of the judgment of the learned Judge there; but I abstain from adverting to that judgment save so far as to ascertain that the bill was dismissed on the merits, because I consider that the question whether the evidence of that decree is conclusive in the present suit depends upon a comparison of the two records."

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[9] Consider in India Explanation II.

In the American case of *Cromwell* v. *County of Sac*[1] the facts were these :— The County of Sac, by a vote of its people, authorized the issue of bonds to the amount of ten thousand dollars for the erection of a Court-house. Bonds to this amount were issued by the County Judge and were delivered to one M, with whom he made a contract for the erection of a Court-house. The contractor, M, on receipt of the bonds, gave one of them as a gratuity to the County Judge. The Court-house was never constructed by M or by any other person. One Smith had become, before their maturity, the holder of twenty-five coupons, which had been attached to the bonds; and he brought an action to recover the amount of these coupons. The final judgment in that case decided that *the bonds were void as against the County in the hands of parties who did not acquire them before maturity and give value for them;* that the plaintiff, not having proved that he gave such value, was not entitled to recover; that whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds, affected equally the coupons for interest attached to them. Subsequently, another action was brought by one Cromwell on four of the bonds, each for one thousand dollars, and four coupons for interest attached to them, each for one hundred dollars. It was shown that Cromwell was the real owner of the coupons in the former action, and that such action was prosecuted for his sole use and benefit; and it was contended that the judgment was a bar to the second action. It was held, however, that, although the finding and judgment upon the invalidity of the bonds as against the County must be held to estop the plaintiff from averring to the contrary, *yet as bonds were negotiable instruments and their issue authorized by due authority, they would be valid obligations in the hands of a bonâ fide holder taking them for value before maturity*—that, if the plaintiff received the bonds and coupons, which formed the subject of the second suit before maturity for value, as he offered to prove, he should have been permitted to shew that fact—that there was nothing adjudged in the former action in the finding—that the plaintiff had not made such proof in that case, which could preclude him from making such proof in the second case, for the fact of a party not having shown that he gave value for one bond or coupon was not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. *Field, J.*, who delivered the the opinion of the Supreme Court, said :—"In considering the operation of the previous judgment, it should be borne in mind, as stated by counsel 'that there is a *difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action.*' In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent

American case of *Cromwell v. County of Sac.*

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[1] Decided in March 1877. I take the above report from the *London Law Times* of the 14th July, 1877, which reprints it from the *American Law Times*. The American Law Reports are not to be had in India.

action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose.*[2] Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is *strictly accurate when applied to the demand or claim in controversy.* Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. *But where the second action between the same parties is upon a different claim or demand,* the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.[3] In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram* v. *Morewood*[4] the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because in a previous action for a similar trespass they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said:—'*It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.*' The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them. . . .

[2] Consider Explanation II, *ante*, p. 236.

[3] Explanation II speaks of *matter which might and ought to have been made ground of defence or attack in such former suit*, but does not add '*or in an issue in such former suit.*'

[4] See *ante*, p. 238.

On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. *A judgment by default only* admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceedings (*Boileau* v. *Rutlin*, 2 Ex. 665, 681: and *Hughes* v. *Alexander*, 5 Dyer, 493). The case of *Howlett* v. *Tarte* (10 C. B. N. S. 813) supports this view. That was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer the replication, after full argument, was held bad. In deciding the case *Willes, J.*, said:—'It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time to go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting up in the first action. I think we should do wrong to favour the introduction of this new device in the law.' *Byles, J.*, said:—'It is plain that there is no authority for saying that the defendant is precluded from setting up this defence.' *Keating, J.*, said:—'This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant.' The language of the Vice-Chancellor in the case of *Henderson* v. *Henderson* (3 Hare 100, 115) is sometimes cited as expressing a different opinion, but upon examining the facts of that case it will appear that the language used in no respect conflicts with the doctrine we have stated." After stating the facts of this case, and quoting the passage given, *ante*, p. 240, the learned Judge said:—"There is nothing in this language applied to the facts of the case, which gives support to the doctrine that whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is in a

subsequent suit between the same parties upon a *different cause of action* precluded from availing himself of such ground."

Turning now to the Indian cases, the first decision which I shall notice is that in *Periya Odaya Taver* v. *Katama Natchiar* (11 Moo. I. A. 50). Here certain suits were instituted in 1832 to recover possession of a *zamindari*, the principal question involved being whether the late *zamindar* was joint with, or separate from, his brother and whether the property was divided or undivided. A, one of the parties in possession, claimed under a will alleged to have been executed by the zamindar, who last held the property. The Courts in India decided against the validity of this alleged will. The Privy Council, on appeal in 1844, held that the requirements of Madras Regulation XV of 1816 as to recording the points in issue had not been complied with, and that the question of division or no division had not been properly tried. They therefore remitted the case to India with liberty to bring a new suit to try that issue. A fresh suit was in consequence brought in India, in which the question of the genuineness of the alleged will was again raised, but the party claiming under that instrument based his case on the assumption that the *zamindari* was undivided property. This suit also was appealed to the Privy Council in 1863, whereupon their Lordships held that the question of division or no division was immaterial, as the *zamindari* had been self-acquired by the first *zamindar*. On the hearing of this appeal A abandoned his claim under the alleged will. The decision of the Privy Council being adverse to him, he instituted a fresh suit for the purpose of establishing the will. The Courts in India decided that the judgment of the Privy Council in 1863 operated as *res judicata*, and came within the provisions of section 2 of Act VIII of 1859. This view was affirmed upon appeal by the Privy Council in 1866. Lord Westbury, who delivered the judgment of their Lordships, after referring to the previous litigation, said :—"The result, therefore, was that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the facts that the respondent's Counsel had deliberately elected to disclaim any title under that instrument as a will, and that, therefore, its validity or invalidity became no longer material for decision. That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might first have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but

Indian Cases.—*Periya Odaya Taver* v. *Katama Natchiar*.

it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds* that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but instead of doing so, when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice, if the course now taken by the appellant of setting up the will were allowed. On every ground, therefore,—*first*, on the general ground *that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly*, upon the personal ground that the appellant having used this document and abandoned all right to it as a will cannot now use it for a different purpose—we are of opinion that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bonâ fides*, and directly contrary to what the appellant must be considered to be bound by."

Khagauli Singh v. Hossein Bakish Khan.

In a suit brought for the redemption of certain land from mortgage, the defendants pleaded that they had been in possession for upwards of twenty years under two deeds of absolute sale. The plaintiffs alleged that the real transaction was a mortgage by way of conditional sale for securing the sum of Rs. 4,000. with interest, and they relied upon an *ikrarnâma* or deed to this effect, and of even date with the deeds of sale. The defendants had previously, in 1863, brought *a suit for arrears of rent* of 37 *bighas* against one of the plaintiffs, who had successfully contended that these 37 *bighas* formed a portion of 75 *bighas*, part of the whole estate which he and the other alleged mortgagors were, under a particular stipulation in the *ikrarnâma*, entitled to hold rent-free. The Deputy Collector in the suit for arrears of rent had tried the question of the validity of the *ikrarnâma*, and had decided that the real transaction was not an absolute sale but a mortgage. In the redemption suit, it was sought to use this judgment of the Deputy Collector as an estoppel between the parties, and the Agra High Court gave effect to it as such. An appeal was preferred to the Privy Council, and their Lordships in reversing the decree of the High Court, observed as follows:—"The judgment of the High Court is founded solely upon the omission of the Judge below to give due weight to the fact that the *ikrarnâma* had been declared to be valid and genuine by the Deputy Collector, and it treats that finding as *res adjudicata* between the parties. But, if the judgment of the Deputy Collector had been final in the matter before him, his incidental finding that the *ikrarnâma* was a valid instrument would not be conclusive between the parties in the present litigation:

* Consider the words "ground of defence" in Explanation II, *ante*, p. 236.

for the question before him was not the issue now raised between the parties: and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent. The eadem causa petendi, *and judgment of a Court of competent or concurrent jurisdiction, are both wanting here.*"[6] (*Khagauli Singh* v. *Hossein Baksh Khan*, 7 B. L. R. 673: 15 W. R. P. C. 30.)

Umatara Debi v. *Annapurna Dasi.*

A claimed certain land as *taufir* or excess of her *talúk*. She sued B to recover it as such, and her suit was dismissed. She brought a second suit to recover possession of the same land, alleging it to be an integral portion of her *talúk*, but the plea of *res judicata* was held to be good. *Phear, J.*, said:—"It is true that the title to possession on which the plaintiff now relies is different from that which she set up in the suit in 1854. In the present suit, she claims the land as being part of her *talúk*, while in 1854, she maintained that this land was *taufir*, which she had reclaimed and occupied as proprietor of the *talúk*, and on that account was entitled, as against the defendant, to have settled with her by Government. But I think the difference in the title put forward does not change the cause of action within the meaning of section 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of a Court of Justice, is simply this,—namely, that she is, as she alleges, wrongfully deprived by the defendant of the enjoyment by possession of certain land which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title or her real title, so much the worse for her. The adjudication in the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported"[7] (*Umatara Debya* v. *Krishna Kamini Dasi*, 2 B. L. R. A. C. 102: 10 W. R. 426.[8] This decision was confirmed by the Privy Council, their Lordships entirely concurring with the judgment delivered by *Phear, J.* The Privy Council said (11 B. L. R. 166, where the case is reported as *Umatara Debi* v. *Annapúrna Dasi*, 18 W. R. 163):—"Their Lordships propose to dispose of this appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second section of the Act of Civil Procedure.[9]

[6] Referring to this judgment, *Markby, J.*, said in *Hari Sankar Mukharji* v. *Mukharji Patro* (15 B. L. R. 240):—"The question was whether the finding of the Collector as to the validity of the *ikrarnáma* was conclusive. Upon this the Privy Council say that the Collector's finding that the *ikrarnama* was genuine, even if final, was 'incidental;' and this for two reasons: *first*, because the question before him was not the issue raised in the second suit; and *secondly*, because his decision was not that of a Court competent to adjudicate on a question of title." See *post*, pp. 393, 394.

[7] Consider the words "ground of attack" in Explanation II, *ante*, p. 236.

[8] Followed in *Brajo Lal Rai* v. *Khetra Nath Mitra*, 12 W. R. 55: *Shib Sankar Neogi* v. *Haro Sundari Gupta*, 13 W. R. 209: and *Dudsar Bibi* v. *Shakir*, 15 W. R. 168: *Pigou* v. *Mahomed Abu Syad*, 3 C. L. R. 253: and *Dina Mayi Debya Chaudhrani* v. *Ananga Mayi*, 4 C. L. R. 599.

[9] The old Code, Act VIII of 1859.

That clause is in these words :—'The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.' The first question that occurs to their Lordships upon that section is, what is meant by the cause of action? And in the present case they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case.[1] The result of those proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit. The first suit was accordingly brought, and in the present suit both Courts have found, and it has been fairly admitted at the bar, that the land which is now in dispute is a portion of the land which was then sued for. *The identity, therefore, of the subject-matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the appellant by reason of the proceeding then taken.* It is sought, however, to distinguish the case upon the ground that the appellant, who was the plaintiff in the former suit, saw fit in that suit to admit that no portion of the land then sued for was included within the limits of Talúk Shahazadapore, as originally settled and defined by the *daul*, but that she had as *talúkdar* of that *taluk*, acquired title to it as *taufir*,—that is, that, by gradual squatting or encroachment, she had enlarged the boundaries of her *talúk*, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her. Now, it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was, whether the lands then sued for, which included the lands now sued for, belonged as of right to the *talúkdar*, or whether they fell within lot 32, which belonged to the defendants. And it was open to the plaintiff, the present appellant, in the former suit to shape her title in either of three ways. She might have said, as she did say according to Mr. Doyne's argument to-day, that the whole of the land then claimed was *taufir* land; or she might have said, a portion of the land fell within the *talúk* as originally settled and formed part of the 7,000 odd bighas mentioned in the *daul*, and the residue of it is *taufir* land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that, should the proof of that fail, that portion also was to be considered as *taufir* land. With the full knowledge of all the circumstances, she chose to say :—"I admit that I am in possession of all that I was entitled to under the *daul*, but I claim this land, the whole of it, as *taufir* land." The contention now is that, although she saw fit to take that course then, she has now a right to fall back upon

[1] Act IV of 1840, the provisions of which were somewhat similar to those of Chapter XII of the present Code of Criminal Procedure, which empowers a Magistrate to deal summarily with disputes as to immoveable property.

the other title, and to say :—" The boundary was improperly drawn so as to include in the defendants' holding that which of right should have been within my originally settled *tálúk*, and, as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed upon principle. . . . . It seems to their Lordships that the matter in dispute throughout was the title of the *talúkdar* of this *talúk* to the land in question and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail and that if the *talúkdar* had any title at all, it was by way of *taufir*. The Court of Appeal, proceeding on the admission of the plaintiff that the whole of the originally settled *talúk* was in her possession, and that all she had been dispossessed of was claimed by her only as *taufir* land, dealt with that claim; but it is perfectly clear that, if the plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the lands sued for from the defendants, who are the defendants also in the present suit. It therefore seems to their Lordships that the case really falls within the principle and letter of the section in question, which has been properly decided to be a bar to the suit," "They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord Westbury in the case of *Kattama Natchiar*.[2] In that case a party had brought a suit, claiming under a will, having, as defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise and resting his title upon the issue whether the estate was separate or undivided; and Lord Westbury said: (Here their Lordships quote the passage which will be found above, pp. 247-248). The present case is even stronger than that referred to, inasmuch as in the latter the party was a defendant in the first and plaintiff in the second suit, whilst the appellant is plaintiff in both suits, and as such had in both the means of shaping her case as she chose."

Súrjamani Dayi v. *Sadanand Mahapatro.*

In the case of *Súrjamani Dayi* v. *Sadanand Mahapatro* (12 B. L. R. 304: 20 W. R. 377) C first adopted A and subsequently adopted B. In 1849, he made a will, by which he gave a nine-anna share of his real estate to A, and a seven-anna share to B, dividing his personal estate equally between them. This will contained a provision that if either

[2] See *ante*, p. 247.

devisee disputed it, he should forfeit all benefit under it. C published the will by filing it in the Collectorate. C and A subsequently quarrelled, and A disputed C's competence to make a will, whereupon C filed two petitions in the Collectorate, disowning A, and acting upon the forfeiture clause in the will. In 1859, A filed a suit against C, B and other persons, who had obtained property under deeds executed by C, for cancellation of those deeds, for cancellation of the adoption of B, for cancellation of the will and for maintenance. The effect of the pleadings in this case was, that A, as plaintiff, sought *inter alia* to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property (he was subject to the Mitakshara law), and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it. The plaintiff in fact sought the decision of the Court on the question, whether C had or had not the power to dispose of all or part of his real property by will, he himself dividing this property under two heads, namely, ancestral property, and that derived from the income or profits of ancestral property. This question was raised by the pleadings and treated by both parties as before the Court, which, in the opinion of the Privy Council, had jurisdiction, and indeed was called upon to decide whether or not the will was operative as to all, or to any, or to what portion of the property. It was decided that, according to the Mitakshara law, A, the son, had a vested right of inheritance in the ancestral immoveable property: that ancestral property was only that actually inherited, and not that which had been acquired or recovered, even though it might have been acquired from the income of the ancestral property; that the income was the property of the tenant for life to do as he pleased with it; that C had it in his power to dispose as he pleased of all acquired and all personal property; and that, by the will and the petitions filed in the Collectorate, he had deprived A of such acquired and personal property, and had given it to B. The will and the deeds were accordingly declared inofficious and inoperative as regarded the ancestral immoveable property, but as regarded all other property A's prayer was dismissed. C died in 1861. After B's death, A brought a second suit in 1863 against B's widow, claiming the whole of the immoveable property left by C as ancestral property acquired by C either (1) by inheritance from his father or (2) by purchase out of the proceeds of the inherited property. With respect to the latter,—*i.e.*, property acquired by purchase out of the proceeds of the inherited property,—B's widow pleaded that the matter was *res judicata;* and the Privy Council held that it was so. Their Lordships, after stating the facts and their view of the pleadings in the previous case, said :—"The second clause of Act VIII of the Code of Procedure of 1859 is in these terms :—'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim.' Their Lordships

are of opinion that the term 'cause of action'[3] is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle '*nemo debet bis vexari pro eadem causa*.' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to, *Gregory* v. *Molesworth*,[4] in

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[3] The meaning of the term 'cause of action' has been the subject of doubt and difference of opinion in India as well as England. In *DeSouza* v. *Coles* (3 Mad. H. C. Rep. 384) *Bittleston*, *J.*, was of opinion, that the *cause of action* means the whole cause of action; and the whole cause of action includes every fact essential to the maintenance of the action, and each of these facts separately is but a part of the cause of action. *Holloway*, *J.*, held that, irrespectively of the domicile of the defendant, there is a competent *forum* wherever a place can be indicated, to which the right and its infraction can both be referred, because there is a cause of action and the whole cause of action—that in fact a truly scientific meaning of the term 'cause of action' embraces nothing more than the right resident in the plaintiff. See also *Harjiban Das* v. *Bhagwan Das*, 7 B. L. R. 109. *Mohan Lal Bhaya Gayal* v. *Lachman Lal*, 5 B. L. R. 675: 14 W. R. 73: and *Chandra Kumar Mandal* v. *Nam Khanum*, 11 B. L. R. 442. Turning to the English cases, the Court of Queen's Bench held that 'cause of action' in section 18 of the Common Law Procedure Act, 1852, meant 'all the facts which together constitute the plaintiff's right to maintain the action' (*Allhusen* v. *Malgarejo*, L. R. 3 Q. B. 340: *Cherry* v. *Thompson*, L. R. 7 Q. B. 573). The Court of Common Pleas on the other hand decided that 'cause of action' in this section means, not the whole cause of action, *i.e.*, the contract and the breach, but a substantial part of the cause of action, such as the act on the part of the defendant which gives the plaintiff his case of complaint (*Jackson* v. *Spittall*, L. R. 5 C. P. 542). The Court of Exchequer were equally divided in *Durham* v. *Spence*, L. R. 6 Ex. 46. Finally, in the case of *Vaughan* v. *Weldon* (L. R. 10 C. P. 18) it was announced that the Judges of all the Courts had determined to follow the view taken in *Jackson* v. *Spittall*, the Court of Queen's Bench yielding not from conviction, but to secure uniformity. The same view has been adopted in India—see *Lalji Lal* v. *Hardeo Narain*, I. L. R. 9 Calc. 105: and *Abdul Kadir* v. *The East Indian Railway Co.*, I. L. R. 1 Mad. 375. The term 'cause of action' is not used in section 13 of the Code of Civil Procedure. It occurs, however, in some other sections—see, for example, sections 17, 43, 44, 45, 46. The term 'right to sue' has been substituted in some sections, as for example in 361, 362 and 368.

[4] 3 Atkyns, 626. Here a plea of a former decree signed and enrolled was pleaded to a new bill for the same matter. Lord *Hardwicke*, *C.*, said:—"This is a plain case, for it would be very mischievous if a new bill was allowed to be brought by the plaintiff here. This is a plea of a former decree made in a cause relevant to the same matter with the present bill. The question will be, *first*—whether the decree is a determination of the points between the parties. As to this it is improper for the Court to give a different judgment, because there would be two contradictory judgments appearing on the same record. The former decree was on a bill brought by the plaintiff's wife to have an account of her father's personal estate, and to have a fifth as her share of it, that bill charges that the defendant pretends the legacy of Margaret Molesworth was lapsed; this is the common and only way of bringing on the question by setting forth the pretences of the defendant, and therefore sufficiently puts the point in issue. The decree

which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston*.[5] Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the plaintiff and the defendant, who, for this purpose, stands in the position of her late husband, that Chuckurdhur's will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that Chuckurdhur (C) did in fact devise the property, over which he had the power of disposition, to Bonomali (B)."

Krishna Bihari Rai v. *Brajeswari Chaudhrani.*

In *Krishna Bihari Rai* v. *Brajeswari Chaudhrani* (L. R. 1 A. 283 : I. L. R. 1 Calc. 144 : 25 W. R. 1, and in the High Court in India, 19 W. R. 63) one C, claiming to be the adopted son of A, brought an action against certain *patnidars*, who had obtained *patni* leases from B, the widow of A, in order to have these leases set aside on the ground that B. having only a widow's estate, had no power to grant them. D intervened in that suit, alleging that he was the heir of A, and was, therefore, entitled to dispute C's alleged adoption. An issue as to the alleged adoption was therefore raised and tried, and decided in favour of C. This decision was confirmed on appeal. The question as to the validity of the *patni* leases was decided by the Court of first instance in favour of the *patnidars*, and no appeal was preferred on this point. Subsequently D, claiming to be heir to A, brought a suit to set aside the adoption of C; but it was held that this suit was barred by the judgment in the former one. Their Lordships of the Privy Council, after stating the facts, and referring to the decision of the Court of first instance and of the Appellate High Court upon the issue of adoption, said :—" There exists, therefore, a final and complete judgment upon the issue raised either at the instance of *Krishna Bihari Roy* (D) or which he adopted, on the very question which he seeks again to raise in this suit. Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch

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has directed an account to be taken of the estate, and expressly that the South-Sea Stock should be sold, and one-fifth part reserved for the benefit of Sir John Molesworth, when he attained his age of twenty-one. This is a full determination against the plaintiff, as if a declaration on the point that the plaintiff is not entitled. Courts of equity, no more than Courts of law, are not obliged to give reasons for their judgment; if a man in a Court of law *brings his action for several demands, and he has a judgment for one only, it is as much a judgment as if there had been a particular determination upon each.* A decree can be altered only by bill of review, either for error on the face of the decree, or for new matter not known at the time of bringing the first bill."

[5] See *ante*, p. 236.

as, it is said, that the case does not come within section 2 of Act VIII of 1859. Now the section is this :—'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between the parties under whom they claim.' Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense. But, however, that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them. It is not necessary for their Lordships to go at length into the reason for their decision, because those reasons appear in a recent judgment of this Board in the case of *Súrjamani Dayi* v. *Sadanand Mahapatro*."* With these cases we may consider the Full Bench case of *Niamat Khan* v. *Phadu Buldia* (I. L. R. 6 Calc. 319 : 7 C. L. R. 227). Here A brought a suit for enhancement against B, who pleaded (1) that no notice of enhancement had been served on him; (2) that his rent was not liable to enhancement, as the tenure had been held at a fixed rate of rent since the time of the Permanent Settlement. This suit was dismissed on the ground that no notice of enhancement had been served; but the Munsif stated in his judgment that he considered the rent enhanceable, and did not believe the documentary evidence produced by B. This portion of the judgment was not however embodied in the decree, which merely dismissed the suit. In a subsequent suit by A to enhance the rent after service of notice, it was held, on the authority of the last two cases, that the question of the tenure being liable to enhancement was *res judicata*, notwithstanding that the finding on this point had not been embodied in the decree made in the first suit. It was however observed that it is obviously very necessary in order to give parties a proper opportunity of appealing that the material findings in each case should be embodied in the decree; and that if a party wishes to appeal against the decision of a particular issue which does not appear in the decree, he should first apply to the Court to amend by embodying this decision therein.†

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* Their Lordships then proceeded to quote with approbation the passage from the judgment in that case, which will be found *ante*, pp. 252. 253; and referring to the decision of the Bengal High Court in *Rahmatula* v. *Sariatula Kagchi* (1 B. L. R. F. B. 61) they said :—"All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it."

† This ruling cannot now be considered good law. It has been virtually overruled by the Privy Council in *Ran Bahadur Singh* v. *Lacho Koer*, I. L. R. 11 Calc. 301 : L. R. 12 I. A. 23, in which case their Lordships held that an issue decided only collaterally could not be *res judicata*. They also laid down that it is the decree and not the judgment which should be looked at, when considering whether a matter is *res judicata* or not. (See *post*, p. 302.) On this latter point, see also *Muttukumarappa*, v. *Arumuga*, I. L. R. 7 Mad. 149 : *Avala* v. *Kuppu*, I. L. R. 8 Mad. 77 : *Anusuyabai* v. *Sakhárám*

Dúrga Persad Singh v. *Durga Kunwari.*

In the case of *Dúrga Persad Singh* v. *Durga Kunwari* (L. R. 5 I. A. 149: I. L. R. 4 Calc. 190; and before the High Court in India, 20 W. R. 154) the facts were these:—F, a Hindu, subject to the Mitakshara law, died, leaving three widows A, B and C, who claimed to have the estate left by their deceased husband registered in their names. They were opposed by D, but the Collector decided in their favour, and their names were registered as the proprietors of the estate. After this registration, A gave birth to a son, G, who lived only for a short time and died in his infancy. Upon the death of G, A, claiming to be entitled to the family property as his heiress, brought a suit against B, C and D to recover two-thirds of such property from B and C, with whom she alleged that D was in collusion, and also to have her possession confirmed as to her own one-third. In that suit D pleaded that F during his lifetime, and after his death his widows and minor posthumous son lived in commensality with him, that the whole of the property was ancestral, and therefore, according to Mitakshara law, after the death of F and G, he (D) was entitled to the ancestral estates. He further alleged that he had, by consent of the three widows, the *amlahs, raiyats*, lessees and others, been installed as the *gadinashin* of *talúk Chakai* (the family estate) *according to the usage which had prevailed of old*, and that since such installation he had been in possession of all the *mouzahs* or villages in suit. He thus claimed to be installed, because, although the estate was joint family property, yet, according to family usage, it was an impartible estate to which he, as the eldest branch of the family, was entitled to succeed. The Court decreed the plaintiff's claim, and this decree was affirmed on appeal by the High Court. There was accordingly a decision in that suit between A and D, that A was entitled to succeed as the mother and heiress of G her son. After the termination of this litigation, D brought a second suit against A and one J, (1) to obtain possession from A by adjudication of his right of inheritance in accordance with *kulachar*, or family usage, in reference to the property left by G, and (2) for an adjudication and order with respect to the right of reversion to the estate, that a deed which had been executed by A in favour of J should be declared illegal and inoperative after A's death. With regard to the claim to recover possession from A, the judgment in the former suit was set up as a bar. Their Lordships of the Privy Council said:—"The question now is, whether in the face of that adjudication the plaintiff is entitled in this suit to recover the possession of the property upon the ground that he, and not the

Panturang, I. L. R. 7 Bom. 464: *Jamiatunnissa* v. *Lutfunnissa* (F. B.), I. L. R. 7 All. 606. *Nando Lal Bhattacharji* v. *Bi lhumukhi Debi*, I. L. R. 13 Calc. 17: and *Indarjit Prasad* v. *Richha Rai*, I. L. R. 15 All. 3, are to the same effect. But "the judgment must be looked at" it has been said, "in order to see what was in issue or what has been heard and decided." The decree according to the Code of Civil Procedure is only to state the relief granted or other determination of the suit. The determination may be on various grounds; but the decree does not show on what grounds, and does not afford any information as to the matters which were in issue or have been decided: *Kali Krishna Tagor* v. *The Secretary of State for India*, I. L. R. 16 Calc. 173: L. R. 15 I. A. 186.

defendant as mother of *Gurbh Narain* (G), was entitled to succeed upon his death. It is contended on behalf of the plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter* v. *Stewart*[8] was cited, in which Lord Westbury held that, as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceeding in the second. But there it *was expressly stated that the equity in the second suit was different from that which had been set up in the first suit*, and that the allegations were also different. *In this case, although the allegations are different, the claim is the same.* The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present plaintiff, who was the defendant in that suit, relied upon his own title and denied that of the mother, the present defendant No. 1 (A), but it was adjudged against him, that the mother was entitled to succeed as the heiress of her son. In a case which is referred to in the judgment of the High Court, reported, 11 Moore's Indian Appeals, page 73,[9] it is said in the judgment pronounced by Lord Westbury, "when a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The plaintiff in his present suit, in the eighth paragraph of his plaint, says: 'On the strength of the aforesaid decree, the defendant No. 1,' that is, the widow (A), 'put your petitioner out of possession.' If that decision was correct she was entitled to put him out of possession. But in the next paragraph he says: 'The cause of action arose from the said date when your petitioner's dispossession took place.' In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained, there would be no end to litigation. A case was referred to from the 3rd Madras High Court Reports, page 320,[1]

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[8] See *ante*, p. 241.

[9] *Periya Odaya Taver* v. *Katama Natchiar*, see *ante*, p. 247.

[1] *Chinniya Mudali* v. *Venkatachella Pillai*, &c. The facts of this case were as follow:—In 1855, the plaintiff's father brought a suit against S and R for possession of the whole of the family property belonging to him and S as coparceners, and to rescind the sale of the village to R, on the ground, that S was old and imbecile and unfit to be trusted with the property, and that the instrument of sale had been obtained through fraudulent advantage taken of his imbecility, and also was made without plaintiff's consent, and therefore, prohibited by Hindu law. The Court decided that S was physically and mentally qualified to manage, and legally competent to deal with, the estate to the extent of his own share. In a petition for review of judgment an objection to the validity of the sale on the ground of its having

in which Chief Justice Scotland seems to have been of opinion that if the same facts were not set up in the former suit, a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice Scotland thought that the former judgment could be impeached was, that *the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.* In the 2nd Law Reports, Indian Appeals, 283,[2] a similar question was brought before the Judicial Committee. It is said in the judgment delivered by Sir Montague Smith,—"It was suggested by Mr. Cave that the former judgment ought not to be binding, because, certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals that were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given. . . . . But it appears in the present case that the family custom was brought before the Court in the former suit. . . . . It was contended that the cause of action in the suit in which the present defendant (A) was plaintiff was not the same cause of action as that which is set up by the plaintiff against her in the present suit. A similar point was considered in the case reported in 2nd Law Reports, Indian Appeals, to which reference has already been made. It was there said:"—(Here follows the passage to be found, *ante*, pp. 254, 255). "Their Lordships think it clear that the decision in the former suit, that the plaintiff (A), as mother, was the heiress of her son, and that she as such

been made without the consent of the coparcener was brought forward, but the Judge refused to consider it on any other ground than the one on which he had given judgment. In 1862, the plaintiff again sued the son of R and the nephew of his son for the whole village on the same ground of imbecility and fraudulent imposition in obtaining the sale. This suit was held barred by the decree in the first suit. The plaintiff then brought a further suit in 1866 against these same defendants to recover half the village sold by S on the ground that it, being joint family property, was sold without the consent of the plaintiff's father, and not for any family benefit. The decree and judgment in the first suit instituted in 1855 were pleaded as a bar to this case. *Scotland, C. J.*, would have thought the cause of action in the third suit concluded by the decree in the first suit, but for the fact that the Judge refused to entertain the question whether the sale was invalid because it was made without the coparcener's consent. "From this," he said, "it is apparent that the ground of action in the present suit was advisedly shut out by the Judge from consideration and adjudication, and consequently expressly excluded from the operation of the general decree of dismissal. It cannot, therefore, be said to have been in any way touched by that decree." *Holloway, J.*, said:—"It is clear that the Judge dismissed the suit on the ground that the plaintiff was not incapable, and that he entered upon no other ground whatever." The decision of the Court, therefore, was, that the principle of *res judicata* did not apply. In this case, therefore, the matter was not *heard and finally decided*, and there was no *laches* on the part of the plaintiff in neglecting the particular ground of attack in the first suit.

[2] *Krishna Bihari Rai* v. *Brajeswari Chaudhrani*, see *ante*, p. 254.

heiress was entitled to possession, is conclusive against the present plaintiff, who was a party to that suit, that she was so entitled, and that she having taken possession under that decree, the plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son. As to the second portion of the claim, namely, whether the plaintiff is entitled to have it declared that the deed which the widow executed in favour of *Joymungul* (J) is void and invalid as against the reversionary heirs, the plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the defendant No. 1 (A). *No doubt the family custom might be set up in this suit for that purpose, for although the plaintiff is barred by the former adjudication from setting it up for the purpose of showing that he is entitled to possession during the life of defendant No. 1, he is not thereby barred from showing that upon her death he, if he survives, will be entitled to succeed her. See the case of Barrs* v. *Jackson.*"[a] The Privy Council declined, however, to remand the case for an adjudication upon this point, because, while the necessary investigation would cause great delay and expense, D's claim was contingent on his surviving A, and the decree would not bind other members of the family, who were not parties to the suit and who might have preferable titles.

In further considering this branch of the subject of *res judicata*, it will be useful to examine two classes of cases, which illustrate important portions of the principle :—(1) that class of cases in which it has been held that the matter directly and substantially in issue in the second suit or in an issue in such second suit was, not directly and substantially, but collaterally or incidentally, in issue in the previous suit; and (2) that class of cases in which the decision turned upon the identity of the matter, the matter in issue in the second suit or in an issue in such suit, being held to be, or not to be, the same matter, which was directly and substantially in issue in the first suit.

Matter, not directly and substantially, but incidentally or collaterally, in issue in the previous suit.

Where a landlord sued his tenant for a *kabuliyat* at an enhanced rate of rent, and the latter pleaded that he was not a *raiyat* but a *talukdár*, and therefore not liable to enhancement, and the Revenue Court decided against him the question thus raised as incidental to the real point at issue as to the *kabuliyat*; and the tenant brought a suit in the Civil Court and obtained a decree declaratory of his rights as a *talukdár*, and then sued in the Revenue Court for abatement of rent—it was held that the previous decision of this Court was not a bar to the trial of the abatement suit. "It cannot be said," it was observed, "because a Court of competent jurisdiction, in deciding upon a particular subject matter, thought it necessary to go into collateral facts for the purposes of that decision, that the opinion of that Court on those collateral facts is conclusively binding in a subsequent suit which relates to a different subject-matter" (*Madhu Ram De* v. *Baidyonath Das*, 9 W. R. 592). It is to be observed however that the Revenue Court, though competent to deal with

[a] See *ante*, p. 239.

the claim to a *kabuliyat*, was not competent to give a binding decision on the question of title raised in the first suit. Where in a suit for rent the defendant pleaded a bond authorizing him to appropriate a certain portion of his rent in reduction of the amount due to him under the bond, the decision of the Revenue Court as to the genuineness of the bond was held not to be a bar to the trial of the same question by the Civil Court in a suit on the bond between the same parties, the Revenue Court not being a Court having jurisdiction concurrent with that of the Civil Court to decide the question. "It is unnecessary for me," said *Peacock, C. J.*, "to determine whether the matter did or did not come collaterally in question before the Collector. If it were necessary for me to determine that question, I should say that it did. But I think it unnecessary to determine that question, because it is clear that the Courts are not Courts of concurrent jurisdiction (*Edan* v. *Bechan*, 8 W. R. 175). A sued B in the regular Civil Court to recover damages for the taking away by the latter of some mangoes which grew on land to which A set up a right. The question of *title* thus raised was tried incidentally in the suit for damages,* and decided in favour of A. B subsequently brought a suit against A for a declaration of right and confirmation of possession, to set aside a survey award, and to have a *takbast* map amended. "It is clear," said *Peacock, C. J.*, "that the cause of action to recover damages for the mangoes, and a suit brought to have a declaration of right, and to set aside a *takbast* proceeding, are not the same, and the plaintiff is not barred by section 2, Act VIII of 1859; nor is he estopped by the decision in the suit relating to the mangoes upon a point which came *collaterally* in issue. It is contended that in that suit the plaintiff paid the stamp-duty upon a valuation not merely of the mangoes, which he sought to recover, but of the lands which he did not seek to recover. But the fact of the plaintiff's having paid a higher stamp-duty in that suit than he was by law bound to pay, cannot affect the rights of the parties in the present suit (*Mahima Chandra Chakravartti* v. *Raj Kumar Chakravartti*, 1 B. L. R. A. C. 4). Here it will be observed that the regular Civil Court (it was a Munsif's Court) would have had jurisdiction in the first case to try the title to the land, if the value thereof were within the pecuniary limits of its jurisdiction. Whether the case was so within the Munsif's jurisdiction does not appear from the report. The decision on the question of title was, however, held not to have the force of an estoppel in the second case, because it had been given upon a *collateral* point. The decision in this case seems to have turned as well upon the fact

* In the case of *Raghuram Biswas* v. *Ram Chandra Dhobi*, (W. R. F. B. 127: B. L. R., Sup. Vol., 34), which was a suit to recover damages for the value of some mango trees cut down and removed by the defendant, it was held by a Full Bench that a Court of Small Causes could try the question of the title to the land as an incidental question, the decision of which was necessary to the adjudication on the claim for damages; but it wa sremarked that the judgment on this point would not be conclusive except so far as regarded the right to the damages claimed. Here the point, besides being a collateral one, was also one which the Court of Small Causes had no jurisdiction to try definitively.

that the *causes of action* in the two suits were different as upon the point decided in the first case being a *collateral* point. In a similar case brought to recover damages for fruit alleged to have been wrongfully taken, the defendants pleaded (1) that the fruit had not been taken; (2) that the tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit had not been taken, but found incidentally that the tree belonged to the plaintiff. The Allahabad High Court held that the defendants could not on the appeal of the plaintiff object to this finding under section 561 of the Code of Civil Procedure, because the Court of first instance did not decide this matter *against* the defendants, seeing that it had not found on a question *substantially in issue* (*Balak Tewari* v. *Kausil Misr*, I. L. R. 4 All. 491: see also *Anusuyabai* v. *Sakhárám Pandurang*, I. L. R. 7 Bom. 464): and the Full Bench case of *Jamaitunnissa* v. *Lutfunnissa*, I.L.R. 7 All. 606: *Ran Bahadar Singh* v. *Lacho Koer*, I. L. R. 11 Calc. 301: L. R. 12 I. A. 23: *Nando Lal Bhuttacharji* v. *Bidhumukhi Debi*, I. L. R. 13 Calc. 17: *Magundeo* v. *Mahadeo Singh*, I. L. R. 18 Calc. 647: see also *ante*, note, p. 255).

In the case of *Chandra Kumar Mandal* v. *Nani Khanum* (11 B. L. R. 434) the facts were as follow:— In 1866 A, a *raiyat*, brought a suit against B in the Revenue Court under clause 6, section 23, Act X of 1859, to recover possession of a piece of land, alleging that he had been in possession thereof under a *maurasi patta*, and had been illegally ejected. B alleged that the *maurasi patta* was spurious. The Deputy Collector tried the question thus raised, found the *patta* to be genuine, and gave A a decree, which was confirmed on appeal. A was restored to possession under this decree. B subsequently brought a suit against the heirs of A in the regular Civil Court for the recovery of possession of the piece of land, alleging that the *maurasi patta* was spurious. It was contended that B was concluded on this point by the decision of the Revenue Court in the former suit; but it was held that the matter was not *res judicata*. *Couch, C. J.*, said:—"The Deputy Collector had to determine two questions—Was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these, it was necessary for him to find whether the alleged lease was genuine; but the real judgment in the suit was that the plaintiff was a tenant, the *patta* being the proof of it. The Deputy Collector had no jurisdiction to give effect to the *patta* as a permanent title; he could only use it as showing that, at that time, the plaintiff had a right to the possession of the land. . . . . The suit now before the Court is against the heirs of A, whose case is that he had a *maurasi patta*; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy was hereditary; and, if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the *patta*, except so far as it established the right of A to the possession of the land when he was ejected, must be considered a finding upon a collateral matter." *Phear, J.*, held that, although the Deputy Collector was unquestionably competent to try the issue as to the *patta* for the

purpose of the suit before him, his decision did not effect a *res adjudicata* between the parties for all other purposes, and this for both the reasons given by Sir W. De Grey in *The Duchess of Kingston's* case; *first*, the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; *second*, the issue as to the execution and authenticity of the *patta* was a question of evidence collateral to the matter which the Collector had to determine.

In *Pahlwan Singh* v. *Risal Singh* (I. L. R. 4 All. 55) A sued B upon an instalment bond for four instalments with interest from the date of the bond. B pleaded that the interest was payable not from the date of the bond, but from the dates of default. It was decided in favour of A's contention that the interest was payable from the date of the bond. Subsequently A sued B upon the same bond for four further instalments with interest from the date of the bond. B again pleaded that the interest was payable only rom the dates of default. It was held that this question of interest was *res judicata*. It was observed that it is the *matter in issue* not the *subject-matter of the suit* that forms the essential test of *res judicata* under the section of the Code of Civil Procedure. And reference was made to the definition of facts in issue, *ante*, p. 86. A, the proprietor of a one-third share in an undivided estate, made a gift of such share to P, a minor, and subsequently in 1875 acting as P's guardian mortgaged this share to B and C, the co-proprietors of the other two-thirds of the estate. P, upon attaining his majority, brought a suit in March 1878 against B and C for possession of a certain plot of waste land which he alleged that they were using as if they were sole proprietors thereof. The District Judge upon first appeal gave P possession. B and C preferred a second appeal to the High Court on the ground that, as the land in dispute was in the possession of them as mortgagees, possession should not have been given to P. The High Court, considering it necessary to have the question tried whether B and C were in possession of P's share as mortgagees, remanded the case to the District Judge, who found this question in the affirmative. This finding was embodied in the final decree of the High Court. P subsequently sued B for possession of his share in the estate, claiming to have the mortgage set aside as having been made without benefit to him and without legal necessity. It was held that the question of the validity of the mortgage having been substantially in issue and determined in the previous suit was *res judicata* (*Nirman Singh* v. *Phulman Singh*, I. L. R. 4 All. 65). A sued C, daughter of B, to recover a one-half share in a brick-kiln, which he claimed by right of inheritance from B, his half-brother. He stated in his plaint that the other half "was owned by him from before." C denied that A had any right in the kiln, which she alleged to have been the exclusive property of B. It was decided by the final Court of Appeal that A's claim to a share in the kiln upon the ground of joint interest was not supported by evidence, and that he had surrendered to C the half share which he claimed by inheritance. C subse-

Cases in which matter was held to have been directly and substantially in issue in previous suit.

quently sued A for the value of bricks alleged to have been wrongfully taken from the kiln, whereupon A pleaded that half of the kiln and bricks belonged to him as co-sharer of B, and urged that in the previous suit he had not sought relief in respect of this half share. Nevertheless, the ownership of this share was held to be *res judicata*, (*Wilaiti Begam* v. *Nur Khan*, I. L. R. 5 All. 514). In *Jeo Lal Singh* v. *Surfan* (11 C. L. R. 483), the question "what is the proper amount of rent payable to the plaintiff" had been tried in a previous suit for rent, and this question was held to be *res judicata* in a second suit for the rent of a subsequent year. See also *Rakhal Das Singh* v. *Hiramati Dasi*, 22 W. R. 282: and *Hari Bihari Bhagat* v. *Pargan Ahir*, I. L. R. 19 Calc. 656, in which it was said that whether the rate of rent was *res judicata* or not depended on whether the previous decision was that the plaintiff should recover from the defendant the sum admitted to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. A took a *patni* lease of certain villages from B in 1861. In 1865 she was evicted from a portion of this property, but at that time took no steps to obtain abatement of the annual rent. Not having paid the rent for 1871, she was sued by B for the rent of that one year. In this suit she claimed by way of defence an abatement of Rs. 155 as representing the annual value of the property which she had lost by the eviction. The issue so raised was tried, and it was decided that the abatement to which she was entitled was Rs. 42. This decision was not appealed, and therefore became final. A then brought a suit against B for the purpose of obtaining a permanent abatement of Rs. 155. It was held that the question of abatement was *res judicata*, and could not be re-opened (*Nabo Durga Dasi* v. *Feiz Baksh Chaudhri*, I. L. R. 1 Calc. 202. 24 W. R. 403. In *Mahima Chandra Mazumdar* v. *Asradha Dasi* (15 B. L. R. 251 note) the first suit was for rent. It was pleaded that the land was *lakhiraj*, and an issue was raised upon this point and decided in favour of the plaintiff, the landlord. This decision was held to be binding in a subsequent suit brought by the tenant for a declaration of his right to hold the land as *lakhiraj*. See also *Mahesh Chandra Bandopadhya* v. *Jaikissen Mukharji*, 15 B. L. R. 248, note. A contracted with B to supply straw for twelve months, the supplies to be sent daily. A failed to supply the straw. On the 12th March B sued him for damages for the default committed up to that date. The contract was denied, but was held to have been proved. A subsequent suit was brought to recover damages for default to deliver between the 17th April and the 16th June. It was held that the second suit was not barred, the contract being a continuing one; but that the *factum* of the contract was *res judicata*—(*Cook* v. *Jadab Chandra Nandi*, 2 B. L. R. O. J. 48).

Other instances of this class of cases will be found in *Basan Lal Sukal* v. *Chandi Das*, I. L. R. 4 Calc. 686 (issue as to area of land in suit for arrears of rent) *Belchambers* v. *Ashutosh Dhar*, 7 C. L. R. 308 (issue as to inclusion of one plot of land in another): *Samarupuri* v. *Shanmuga*, I. L. R. 5 Mad. 47 (issue as to partnership) · *Raja of Pittapur* v. *Bachi Sittaya Garu*, I. L. R. 8 Mad. 219: L. R. 12 I. A. 16 (issue as to adoption, finding

heki binding, though suits related to different properties). *Venkatraddi Appa Rau* v. *Peda Venkayammar*, I. L. R. 10 Mad. 15: *Ram Chandra Singh* v. *Madhu Kumari*, I. L. R. 12 Calc. 484: L. R. 12 I. A. 188 (issue as to nature of tenure of tenants) *Vishnu Chintaman* v. *Balaji bin Raghuji*, I. L. R. 12 Bom. 352: *Radha Madhab Haldar* v. *Manohar Mukharji*, I. L. R. 15 Calc. 756: L. R. 15 I. A. 97 (issue as to title by purchase at sale in execution of a mortgage-decree) *Trailokya Nath Singh* v. *Pratab Narain Singh*, I. L. R. 15 Calc. 808: L. R. 15 I. A. 113: *Kamini Debi* v. *Ashutosh Mukharji*, I. L. R. 16 Calc. 103: L. R. 15 I. A. 159 (issues as to validity of wills): *Ananta Balacharya* v. *Damodhar Makond*, I. L. R. 13 Bom. 25 (issue as to partition; the pieces of land forming the subjects of dispute in the two suits being different): and *Balkishan* v. *Kishanlal*, I. L. R. 11 All. 148. In this suit the subject of claim was a right to *malikana* allowance, and it was held that the plaintiff's claim was barred, as in a previous suit, in which *malikana* for a different year had been claimed the plaintiff's title to receive *malikana* had been disallowed. In this case it was said that for the purposes of *res judicata* it was not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication was made the foundation for the plea, and that the general rule of law was that where a recurring liability was the subject of a claim, a previous judgment dismissing the suit upon findings which fell short of going to the very root of the title upon which the claim rested could not operate as *res judicata*, but if such previous judgment did negative the title itself, the plaintiff could not re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. See also *Gopi Nath Chobe* v. *Bhagwat Prasad*, I. L. R. 10 Calc. 697. The cases of *Chhagan Lal* v. *Bapu Bhai*, I. L. R. 5 Bom. 68: and *Dulabh Vahuji* v. *Bansidhar Rai*, I. L. R. 9 Bom. 111, lay down the same principle, for in them it has been said that when a plaintiff has already obtained a declaratory decree, establishing his title, it is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree.

Turning now to the second class of cases, I shall give instances in which the matter directly and substantially in issue in the second case or in an issue in such case was held not to be identical with the matter directly and substantially in issue in the previous case. A alleged that he had purchased a certain property from B. Three and a half kanees of land, part of this property, were attached in execution of a decree as belonging to B. A objected to the attachment, but his objection was overruled, and the three and a half kanees were sold and purchased by C. Upon this, A brought a suit against C to have it declared that these three and a half kanees belonged to him; and to this suit he made B a co-defendant. This suit was dismissed on the ground that A was holding *benami* for B. Subsequently, C bought from B the rest of the *talúk*, and brought a suit against her to obtain possession. The three and a half kanees were not included in this suit. A came in and got himself made a party,

Cases in which matter of second suit not identical with matter of first suit.

and it was held that he was not estopped by the judgment in the former suit, there having been no dispute in that suit between A and C, or between A and B as to the property other than the three and a half kanees. As to this remaining portion there could not have been any dispute in the former suit between A and C, for the latter had not then acquired his title; and as between A and B (C's alleged assignor) the record of the former suit did not show any matter alleged by the one and denied or confessed by the other (*Ram Chandra Chaudhri* v. *Kashi Mohan*, 21 W. R. 57). See also *Mani Rai* v. *Rajbansi Koer*, 25 W. R. 393: *Kali Krisha Tagor* v. *Secretary of State for India*, I. L. R. 16 Calc. 173: L. R. 15 I. A. 186: and *Moro Abaji* v. *Narayan Dhonbhat Pitre*, I. L. R. 11 Bom. 355. A brought a suit against B to recover possession of certain property pledged to the latter under a *zar-i-peshgi* lease. He obtained a decree, which declared him entitled to possession on depositing Rs. 4,824, the amount found to be still due on the mortgage. He did not deposit this money; but, four years after, he applied to execute the decree, alleging that the amount had been paid off by the usufruct of the property since the date of the decree. This application was refused, the Court declining to enter upon the necessary inquiry. A then brought a suit to recover possession of the property upon the ground that the mortgage debt was discharged from the usufruct. It was held that this suit was not barred by the judgment in the former suit, for the matter which the Court had to determine in the second suit, *viz.*, the result of the accounts at a period subsequent to the first suit, was a matter which had arisen and come into being since the matter of such first suit had been heard and determined—(*Rai Dinkur Dayal* v. *Sheo Ghulam Singh*, 22 W. R. 172). A mortgagor obtained in 1866 a decree which declared him to be entitled to recover possession of the mortgaged property on payment of a certain sum to the mortgagee. This decree did not, however, declare that the mortgagor would be foreclosed, if he did not exercise his right of redemption. The payment was not made. A second suit to redeem brought by the mortgagor in 1881 was held to be maintainable (*Sami Achari* v. *Soma Sundram Achari*, I. L. R. 6 Mad. 119. See also *Periandi* v. *Angappa*, I. L. R. 7 Mad. 423: and *Karuthasami* v. *Jaganatha*, I. L. R. 8 Mad. 478). The contrary view was taken by the Bombay High Court in *Gan Sávant Bál Sávant* v. *Náráyan Dhond Savant*, I. L. R. 7 Bom. 467: and *Maloji* v. *Sagaji*, I. L. R. 13 Bom. 567, and by the Allahabad High Court in *Anrudh Singh* v. *Sheo Prasad*, I. L. R. 4 All. 481, and see *Kirti Chandra Mitra* v. *Anath Nath De*, I. L. R. 10 Calc. 97: 13 C. L. R. 249. Certain property was attached in execution of a decree. A objected to the attachment on the ground that he was *in possession under a deed of mortgage* and conditional sale, which had become absolute. His objection was disallowed, and the property was sold and purchased by B. On this, A brought a suit against B and the decree-holder to establish his right. This suit was dismissed on the ground that A *had not established the mortgage* and conditional sale. The document, which was evidence of this transaction, was inadmissible, because it was unstamped. It was also held that A had failed to prove a title based on thirty years

possession as owner. B was however, unable to obtain possession; and, in consequence, he *brought a suit to eject* A. This suit failed, the High Court holding that A had been more than twelve years in possession, which was sufficient to raise a bar to B's suit according to the provisions of the Limitation Act. Subsequently B's sons brought a suit against A's son to *redeem the mortgage* which A had made the basis and limit of his rights. It was contended that this suit was barred by the former judgment, as A had from the first asserted the mortgage as the foundation of his right, and B being thus fully apprized of this was bound to bring forward in the former suit every circumstance by which his own claim to possession could be supported and of which he was at the time aware. The Bombay High Court, however, held that the suit was not barred. *West, J.*, said:—"The principle of *res judicata*, simple enough in its statement, is one that seems to present considerable difficulty in its application. We have been referred to a great number of decisions of the High Courts, which it would be hard, perhaps impossible, to reconcile in all respects with each other. The principal variances have arisen from different views of what did not or did constitute, for the purposes of a second suit, a ground of right identical with the one relied on in a previous suit between the same parties. In the case of *Dudsar Bibi* v. *Shakir, Bayley and Mitter, JJ.*, ruled that, after suing as a donee, the plaintiff could not sue again for the same property as heir. His whole title, whatever it might be, ought, those learned Judges thought, to have been brought forward at once. The same view is taken in *Brajo Lal Rai* v. *Kheternath Maitro*; and that all the grounds of suit must be brought forward at once is repeated in *Premanand Goswami* v. *Ram Charan Deb and another*. On the other hand, Lord Westbury's *dictum* in *Hunter* v. *Stewart*, that knowledge of a second ground of right, when a first one is relied on in a suit, does not prevent that second ground being afterwards made the basis of a second suit seeking the same relief as the first, has been fully adopted by this Court in *Bhisto* v. *Ramchandra*, and has been recognized in other cases. In the case of *Umatara Debya* v. *Annapurna Dasi*" (see *ante*, p. 249) "the Privy Council may at first sight seem to have departed from the principle enunciated by Lord Westbury, but there the whole cause of action was considered as having arisen out of the decision of the Revenue Authorities. The transaction between the parties had been such as for judicial purposes should properly be regarded as one, and on that one transaction several suits between the same parties could not proceed. As is said by *Cleasby, B.*, in *Death* v. *Harrison*, 'though the particular claim . . . . . was not in controversy' (in the previous suit), 'the subject-matter out of which it arose was,' and in such circumstances the allowance of repeated suits would lead to vexatious litigation. In the case *Stevens* v. *Tillett*, *Willes, J.*, says, that 'matter in respect of which no evidence was given on the former occasion may be inquired into' and the matter must be regarded as essentially different when it did not originate in the same transaction, and when it constitutes, as averred, a wholly different right in the plaintiff giving rise to a different duty on the part of the

defendant. In Special Appeal 488 of 1873 it is said, that a plaintiff suing for ejectment cannot in that suit obtain a decree for redemption of a mortgage of which he had notice when he filed his suit, but it is not said that he is debarred from enforcing redemption in another suit. The relative rights and duties of owner and trespasser on the one hand, and of mortgagor and mortgagee on the other, are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor" (*Shridhar Vinayak* v. *Narayan Babáji*, 11 Bom. H. C. Rep. 224). See also *Girdhar Manordas* v. *Dayabhai Kalabhai*, I. L. R. 8 Bom. 174, and *Nilo Ram Chandra* v. *Govind Ballal*, I. L. R. 10 Bom. 24. In a former suit by the plaintiff against the defendant for rent, the latter denied the tenancy and the plaintiff's title to the land. The plaintiff thereupon sued him as a trespasser in the Civil Court for possession and *mesne* profits. The failure of the suit for rent was held to be no bar to the recovery of *mesne* profits (*Dataram* v. *Ram Krishto*, 9 W. R. 594: *Kadir Baksh* v. *Ghulam Ali Gomashta*, 9 W. R. 90). A suit to recover enhanced rent after service of notice was held to be no bar to a second suit brought after the failure of the first to recover arrears of rent for the same year at the former rate (*Khedarunisa Bibi* v. *Búdhi Bibi*, 13 W. R. 317).[5] A Hindu sued to establish his right to a half share in certain ancestral property, and in the schedule attached to his plaint he stated that he was in possession of certain lands, a portion of the whole property. A decree was passed in his favour, which was appealed to the Privy Council. While this appeal was pending, he brought a second suit to recover possession of the lands, possession of which he had admitted in the schedule to his first plaint. He alleged that he had been forcibly dispossessed from these lands during the pendency of the first suit. The cause of action in each case was clearly different, and it was held that the principle of *res judicata* had no application (*Gúrú Das Rai* v. *Haronath Rai*, 7 W. R. 423). A suit to raise an attachment on a house, which failed, was held not to be a bar to a second suit against the purchaser in execution to recover possession of the same house (*Moro Balkrishna Mule* v. *Badirúdin Kamble*, 5 Bom. H. C. Rep., A. C. 199). In the case of *Mohan Lal Bhya Gyal* v. *Lachman Lal* (5 B. L. R. 663) the facts were as follow:—A Hindú died leaving a sister, A, and a deceased sister's son, B. Upon A taking possession of the property, B brought an action against her claiming to be the preferable heir. This action failed. A having died and having left an adopted son, C, B brought a second suit to obtain the property, alleging that C was not the adopted son of A, and that he (B), who came within the class of *bandhús*, was entitled to succeed to the property, as there was no nearer heir alive. The principle of *res judicata* was held to have no application. "The cause of action in the second case," it was remarked, "was the retention of certain property, of which the defendant, by averment of his right

[5] And see the Full Bench case of *Sáddarudin Ahmad* v. *Beni Madhab Rai*, I. L. R. 15 Calc. 145, and other cases cited at pp. 217 and 718, Rampini and Finucane's Bengal Tenancy Act.

of inheritance by adoption, prevented the plaintiff, as sister's sons, from obtaining possession; and it was clearly stated in the plaint that this, the plaintiff's cause of action, arose on the death of A. In the former suit the present plaintiff sued A; alleging that she, as a childless Hindú widow, had no right to hold the property under the Hindu law." A sued as heir of his deceased wife C, to recover certain property alleged to have been given to C by her mother B, the defendant. B pleaded an oral agreement between her, A, and C, that the deed of gift should not operate as a conveyance until after B's death; and that during her lifetime C should hold the property *benami* for her. In a previous suit against B by a creditor, A had been made a party, and the deed of gift had been declared fraudulent and void as against creditors. The judgment in that suit was held by the Privy Council to have no effect as an estoppel in the second suit. In the first suit the issue was fraud or no fraud against creditors. In the second suit B did not set up that defence, and if she had done so, it would have been a serious question whether she could have been allowed to avoid her own deed on the ground of her own fraud) *Ramanugra Narain* v. *Mahasundar Kunwar*, 12 B. L. R. 433). A sued B to recover money due as wages, alleging that B had engaged him to sell cloth on his account at a fixed monthly salary. B claimed as a set-off the price of cloth which he alleged A had sold for him on commission. It appeared that B had previously sued A to recover the same amount as he now claimed as a set-off as being due for the price of cloth sold and delivered by him to A, and A (then defendant) had pleaded that there had been no sale to him, but that the cloth had been delivered to him on commission sale. The suit was dismissed on the ground that there was no proof of a sale of the cloth, and the question whether any sum was due for cloth sold on commission sale was not gone into. It was held that B.'s claim for such set-off was not barred as *res judicata*: *Amir Zama* v. *Nathu Mal*, I. L. R. 8 All. 296.

See also the following cases:—*Raghunath Mandal* v. *Jugat Bandhu Basu*, I. L. R. 7 Calc. 214: 8 C. L. R. 393 (First suit upon a *jama-bandi* for rent; second suit for measurement and abatement): *Ekram Mandal* v. *Halodhar Pal*, I. L. R. 3 Calc. 271 (First suit for rent upon lease which contained a provision for re-adjusting the rent after measurement; defence that land was less, and rent should therefore be less than was claimed; land measured and found to be more; second suit for enhancement on ground of land being more than quantity for which rent was paid): *Gopi Mohan Mazumdar* v. *Hills*, I. L. R. 3 Calc. 789 (First suit for rent at a certain rate per *bigha*; second suit for enhancement after notice): *Sadu* v. *Baiza*, I. L. R. 4 Bom. 37 (First suit to recover property under an agreement; second suit to enforce right of inheritance): *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 5 Bom. 48 (First suit by son against father and brother to obtain partition of ancestral estate dismissed by Supreme Court, because plaintiff not entitled to compel partition of moveables in father's lifetime, and immoveables outside jurisdiction; held by Privy Council no bar to second suit after father's death against brother to recover one-half of the

joint-business and estate). *Konerráv* v. *Gurráv*, I. L. R. 5 Bom. 589 (First suit for parcel of land upon basis of private partition; second suit for general partition): *Kashinath Morsheth* v. *Ram Chunder Gopinath*, I. L. R. 7 Bom. 408 (First suit to set aside an attachment dismissed, as attachment had already been removed; second suit to set aside a subsequent attachment not barred by such dismissal): *Muttu Chetti* v. *Muttan Chetti*, I. L. R. 4 Mad. 296 (First suit to recover money secured by a writing upon an alleged verbal promise by the defendants to pay their proportionate amounts in November 1876; second suit to recover the money as payable on the date specified in the writing): *Ananda Ráman Vathiar* v. *Paliyil Vittil Nanu Nayár*, I. L. R. 5 Mad. 9 (First suit in 1874 by A against B to recover land held under a lease; in this suit C was made a party as holding under B, but pleaded that he held under D: the suit was dismissed on the ground that C held under D; the dismissal was held to be no bar to a fresh suit by A against C and D to recover the land)[6] *Ratan Rai* v. *Hanuman Das*, I. L. R. 5 All. 118: *Ahmad Hosein Khan* v. *Nihal-udin Khan*, I. L. R. 9 Calc. 945: L. R. 10 I. A. 45: 13 C. L. R. 330 (Privy Council observed that first adjudication was altogether upon a different sort of claim)[7]; *Gobind Chundra Adya* v. *Afzal Rabbani*, I. L. R. 9 Calc. 426: 12 C. L. R. 29: *Girdhar Manoi Das* v. *Dayabhai Kalabhai*, I. L. R. 8 Bom. 175 (First suit for ejectment based on alleged lease: second suit to eject tenant as trespasser founded on right of *ownership*): *Amanat Bibi* v. *Imdad Husain*, I. L. R. 13 Calc. 800: L. R. 15 I. A. 106 (First suit to establish sub-proprietary right; second suit to redeem the same property under a mortgage): *Fatmabhai* v. *Aishabhoi*, I. L. R. 13 Bom. 242 (First suit for share of property as widow of deceased owner compromised without recording any finding as to whether plaintiff was a legal heir or not; second suit based on subsequent event, *viz.*, alleged re-marriage of the defendant in consequence of which it was said the defendant's share in the property was by law and custom forfeited and reverted to the heirs of the deceased owners).

[6] But see *Gopal Das* v. *Gopinath Sirkar* (12 C. L. R. 38), in which the plaintiff sued A for rent, who denied that plaintiff was his landlord, and alleged that he held under B and C. Plaintiff failed to prove his title, and his suit was dismissed. Plaintiff then sued, A, B, and C, for possession alleging same title, facts and same relation between the parties. But the question in both suits was said to be identical, namely, the title of the plaintiff to the rent, and the second suit was therefore held to be barred.

[7] Does the term 'matter' directly and substantially in issue include *law*; or is it to be limited to *fact*? In *Parthasarathi Ayyangar* v. *Chinna Krishna Ayyangar* (I. L. R. 5 Mad. 304), it was held that the decision of a competent tribunal upon a question of law directly and substantially in issue is not conclusive between the parties to the proceedings in which it was pronounced, but that its propriety can be questioned in subsequent proceedings between the same parties. But in *Gauri Koer* v. *Auth Koer*, I. L. R. 10 Calc. 1087, when a Division Bench had decided as a point of law that a property had not passed under a certain deed of sale, and subsequently that decision on that point of law was in another case disapproved of by a Full Bench, and the plaintiff again sued to recover the same property, relying on the same deed of sale, it was held that the decision of the Division Bench was no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved.

Explanation I provides that the matter must, in the former suit, have been alleged by one party, and either denied or admitted, expressly, or impliedly, by the other. In *Boileau* v. *Rutlin* (2 Exch. 665) *Park, B.*, suggested that pleadings are not to be treated as allegations of the truth of the facts stated therein *for all purposes*, but only as statements of the case of the party *for the purposes of the suit*, to be admitted or denied, and if denied, to be submitted to judicial decision—that facts actually decided by an issue in a suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it; but the statements of a party in a declaration or plea, though *for the purpose of the cause* he is bound by those that are material, ought not to be treated as admissions for all purposes of the truth of the facts stated. Matter alleged in the written statements of the parties may in subsequent proceedings be relevant as an admission; but it will not operate as an estoppel, unless, being admitted or denied and found in favour of the person alleging it, it form the basis of judicial decision. Matter not put in question by the parties and not necessary to the adjudication of the subject-matter of the suit, is immaterial, and any observation of the Court thereupon is *obiter dictum*, which can have no effect in any other litigation.[8] For cases illustrating the application of this Explanation see *Shama Charan Chatarji* v. *Prasanno Kumar Santikari*, 5 C. L. R. 251: *Sheo Ratan Singh* v. *Sheo Sahai Misr*, I. L. R. 6 All. 358: and *Sheoraj Rai* v. *Kashi Nath*, I. L. R. 7 All. 247.

Explanation I.—Matter must have been alleged and denied or admitted.

Explanation II provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. See in connection with this part of the subject the case of *Umatara Debya* v. *Annapurna Dasi*, *ante*, p. 249. In *Marriot* v. *Hampton* (7 T. R. 269: 2 Esp. 546: 2 Smith, L. C. 405) the defendant had brought a previous action against the plaintiff for goods sold. The plaintiff had paid for the goods and obtained the defendant's receipt; but being unable to find it at the time, and having no other proof of payment, he could not defend the action and had to pay the money again. He afterwards found the receipt and thereupon brought an action for money had and received, to recover back the amount, of which payment had thus been wrongfully enforced. Lord Kenyon was of opinion that, as the money had been paid under legal process, it could not be recovered back again, and the

Matter which might have been made ground of defence or attack in the former suit.

[8] If the Court decide a point put in question by the parties, but not necessary to the adjudication of the subject-matter of the suit, will such decision be binding? It may be said that the point was not directly and substantially in issue; certainly it was not *material*.—See on the point the authorities cited, 2 Smith L. C., 7th edn.

plaintiff was non-suited. An application to set aside the non-suit and grant a new trial was refused. *Lord Kenyon, C. J.*, said:—"If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person ..... It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; they are as often refused; but this goes much further." *Grose, J.*, said:—"It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." *Lawrence, J.*, remarked that the proposition that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhaul the former judgment, is too preposterous to be stated.[9] Here the matter directly and

[9] The case of *Marriot* v. *Hampton* is usually cited as establishing the principle that *money paid under compulsion of law cannot be recovered back as money had and received*, and it is for this purpose used by the learned author of the leading cases. It also, however, illustrates and establishes the principle of *res judicata*. The rule that money paid under compulsion of law cannot be recovered back is subject to some qualification. In *Shama Persad* v. *Haro Persad*, (10 Moo. I. A. 203,) the Lords of the Privy Council said:—"There is no doubt that, according to the law of England—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it was recovered remains in force. But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded; and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question therefore in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." These remarks were quoted in the case of *Jogesh Chandra Dutt* v. *Kali Charan Dutt* (I. L. R. 3 Calc. 39), and were applied by a majority of a Full Bench of the Calcutta High Court to the following facts. A sued B in 1859 to enhance the rent of certain property held by the latter as tenant under the former. B claimed to hold at a permanent fixed rent of Rs. 461. The Court of first instance gave A a decree enhancing the rent to Rs. 2,417. This decree was affirmed on appeal by the District Judge in 1864, and by the High Court in 1865; but was reversed in 1873 by the Privy Council, who held that the old rent could not legally be enhanced. Meanwhile, between 1865 and 1873, A brought sixteen suits (twelve under Act X of 1859, and four under Act VIII (B. C.) of 1869) against B for arrears of rent at the enhanced rate; and, having obtained decrees, realized the amounts decreed. After the decision of the Privy Council, B brought a suit to recover back Rs. 8,560, the difference between the old and the enhanced rent realized by A in these sixteen suits. Three Judges out of five held that he was entitled to recover. This may be regarded as a case of an *estoppel against an estoppel*, which, said Lord Coke, "setteth the matter at large," B was estopped by a decree then unreversed from saying that at the date of each of the sixteen decrees his rent was not Rs. 2,417; and A was estopped by the Privy Council decree from saying, when the suit to recover Rs. 8,561 was brought that B's rent was not Rs. 461. The case also falls within the principle of the following passage:—"Although a final judgment of a Court of competent jurisdiction, whether in this or any other country, will operate as a bar to a claim for the same matter in a Court of Equity, yet if from any circumstance, such as fraud, mistake or surprise, it is against conscience that the defendant should avail himself of such a bar, a Court of

substantially in issue in the former suit was the question of payment, and on this question the former judgment was held to be conclusive. In *Muthunadeva Naik* v. *Sevathamuttunadeva Naik* (7 Mad. H. C. Rep. 160), the plaintiff, alleging a custom of primogeniture, and that he was the eldest son of the late owner, sued to recover possession of certain property. He was held to be barred by a previous judgment against him in a former suit brought by him to obtain a declaration of his status as the son of his father's *Pattaba Stri*, or royal wife, and consequently entitled to inherit the zamindari on his father's death to the exclusion of the defendant's mother and her children. 'The *causa* in the first suit,' it was observed, was 'being heir,' and Paulus does not say that a new suit for the same subject-matter may be brought because a new basis in fact of the same *causa* is adduced, but where there is a different *causa*. The present case seems to fall within his words *mutatam actionem opinio petito. is non facit.*" In *Janaki Ammal* v. *Kamalathammal* (7 Mad. H. C. Rep. 263), A had sued as owner by a right of inheritance to recover the property of her deceased husband, and B had unsuccessfully resisted, setting up a *preferable right to inherit*. B then brought a suit to recover half the same property *on the basis of a family agreement*; but she was held barred by the previous proceedings. See also *Radhia* v. *Beni*, I. L. R. 1 All. 560. In *Kashi Kissor Rai Chaudhri* v. *Kristo Chandra Sandyal Chaudhri* (22 W.R. 464), the plaintiff sued for a declaration of his right to a certain *chur* on the ground that it was an accretion to his mauzah A; and it was held that his suit was barred by a judgment in a former suit in which he had unsuccessfully sued for the same *chur* on the ground that it was an accretion to his mauzah B.[1] In *Dinobandhu Chaudhri* v. *Krishtomoni Dasi*[2] (I. L. R. 2 Calc. 152), the facts were these:—A and his wife B had a daughter C, who was married to D. After the death of C and the subsequent death of A, B sued D for the recovery of certain property which she alleged that D held under pretence of a deed of gift from A to C, such deed of gift being in reality a forgery. The deed of gift was found to be genuine, and B failed, whereupon she brought a second suit to recover the same property by virtue of her right as heiress to her daughter C; but it was decided by four out of the five Judges composing the Full Bench, that she was concluded by the

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Equity will interfere to set it aside" (p. 574 Daniell's Chancery Practice, 5th ed., 1893. See the cases quoted in the note). Courts of India are bound to administer justice, equity, and good conscience; and have therefore full power to apply the above principle. See some remarks upon the case of *Marriot* v. *Hampton* at p. 295 of Phillimore's *Principles and Maxims of Jurisprudence*.

[1] Reference was here made to the judgment of *Holloway, J.*, at 3 Mad. H. C. Rep. 320, and to the principle of Roman Law there stated, *viz.*, that the identity of the question is not destroyed by the origin of the right being different. See Savigny 6, 412, and note, *supra*, p. 257. See also *Haji Hasan Ibrahim* v. *Mancharal Kalian Das*, I. L. R. 3 Bom. 137, and *Naro Hari* v. *Anpurnabai*, I. L. R. 11 Bom. 160.

[2] This case, decided by a Full Bench, is important, inasmuch as the effect of the Privy Council decision in *Umatara Debya* v. *Annapurna Dasi* was here discussed.

previous judgment.[3] In *Devrâv Krishna* v. *Halambai*, (I. L. R. 1 Bom. 87,) the plaintiff had sued the defendants as *principals* to recover damages for the non-delivery of firewood. They pleaded that they had acted merely as the plaintiff's agents, and had not themselves contracted to deliver the firewood. This plea succeeded, and the suit failed. It was held that the plaintiff could not again sue to make them liable as his responsible agents under a trade usage.[4] In *Baldeo Sahai* v. *Bateshar Singh* (I. L. R. 1 All. 75), the defendants, having purchased an estate in the plaintiff's possession, sued him to recover possession of it. The plaintiff resisted the suit merely on the ground that he had purchased at auction; and defendants obtained a decree, whereupon the plaintiff brought a suit to recover the property on the ground of a right of pre-emption in respect thereof. It was held that he was barred by the former judgment, as he might have set up this right in answer to the previous suit.[5] A and B were brothers. After their father's death, A sued B for a moiety of the family property, moveable and immoveable, valued at Rs. 12,000. He admitted being in possession of about Rs. 1,000, and claimed property or damages to the amount of Rs. 5,000 more, in order to complete his share. He obtained, however, a decree for merely half a share in a house and shop, worth about Rs. 700, the rest of his claim being rejected. B subsequently brought a suit against A to obtain a moiety of the property which A had in the previous suit admitted to be in his possession, and of other property alleged to have been fraudulently concealed. It was held that this suit would not lie, as, if A had in the former suit claimed more than he was entitled to, B might have urged that fact as a ground of defence (*Maktum Valad Mohidin* v. *Imam Valad Mohidin*, 10 Bom. H. C. Rep. 293). See also, as illustrations of the principle, the following cases:—*Sultan Ahmad* v. *Maula Baksh*, I. L. R. 4 All. 21 (Will not set up as a defence in previous suit[6]): *Hari Narayan Brahme* v. *Ganpatrav Daji*, I. L. R. 7 Bom. 272 (Property not brought into hotch-pot in previous partition suit): *Ghursobhit Ahir* v. *Ram Dut Singh*, I. L. R. 5 Calc. 923: 6 C. L. R. 537: *Wafid* v. *Sahiba*, 8 W. R. 307: *Nafar Chandra Pal Chaudhri* v. *Lakhi Mani*

[3] With this case may be compared *Nausha Begam* v. *Amrao Begam* (7 N. W. P. Rep. 60). The plaintiff had brought a previous suit to obtain a one-fifth share of her deceased husband's estate as legatee under an alleged will, and failed because the will was held invalid. She then sued to recover three-forty-eighths of the same estate, relying upon her title as heiress. A Full Bench of five Judges unanimously held her not barred by the previous judgment. *Hunter* v. *Stewart* was referred to. The judgments are very brief, and the facts are not very fully stated. Some of the Judges thought that the case would have been different if, instead of suing for a legacy under the will, the plaintiff had brought her previous suit for the administration of her husband's estate. Why the will was found invalid does not appear from the report.

[4] The following cases furnish other states of facts under which plaintiffs were held barred from bringing a second suit.—*Premanand Gosami* v. *Ram Charan Deb*, 20 W. R. 482: *Srikristo Biswas* v. *Jai Kisto Biswas*, 24 W. R. 804.

[5] See also *Jadu Lal* v. *Ram Ghulam*, I. L. R. 1 All. 316.

[6] The case of *Periya Odaya Taver* v. *Katama Natchiar* (*ante*, p. 247) proceeded also upon the ground that the appellant having used the document and abandoned all right to it as a will could not be allowed to use it afterwards for a different purpose. The waiving or abandoning of a ground of

Debya, 9 W. R. 300: *Asgar Mahomed* v. *Nazima*, 14 W. R. 272: *Narain Dat* v. *Bhairo Bakshpal*, I. L. R. 3 All. 189 (Right of pre-emption not set up in previous suit for redemption of a mortgage): *Ali Khan* v. *Appadu*, I. L. R. 7 Mad. 304 (Unsuccessful suit for rent under Madras Rent Recovery Act held a bar to suit for damages for use and occupation): *Chenvirappa* v. *Puttappa*, I. L. R. 11 Bom. 708 (Plaintiff held estopped from raising a question of fraud, which he might and ought to have urged in the former suit: a party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through lies): *Mahabir Prasad Singh* v. *Macnaghten*, I. L. R. 16 Calc. 682: L. R. 16, I. A. 107 (Plaintiff held estopped from setting up an equity to have an account and set-off of rents against a mortgage debt, which should have been pleaded in defence in a previous suit brought against them for the mortgage debt): *Kameshwar Prasad* v. *Ratan Koer*, I. L. R. 20 Calc. 79 (Mortgagee of deceased widow's estates having sued reversioner for mortgage debt on the ground that in his hands was the property chargeable held estopped in subsequent suit from suing on ground that the reversioner had taken a surrender of the estate from the widow during her lifetime, and had then agreed to be responsible for her debts).

On the other hand, in the following cases there was held to be no estoppel.

Cases in which it was held there was no estoppel.

In *Allunni* v. *Kunjusha*, I. L. R. 7 Mad. 264, the plaintiff, having sued for possession of certain lands which had been granted to the defendant for maintenance under an oral agreement which had been broken, was held not estopped for suing as *karnavan* to resume the land. In *Sheo Ratan Singh* v. *Sheo Sahai Misr*, I. L. R. 6 All. 358, two nephews of the deceased owner of a share in a village had sued to establish a right of pre-emption to one-third of the share, which had been alienated by the widow and another nephew of the deceased owner. The plaintiff alleged that they and the other nephew had acquired, and entered into, exclusive possession of the estate as heirs of the deceased owner. The suit was dismissed on the ground that the plaintiffs had not proved their possession of the estate, and the question of their right as heirs to the deceased owner was not decided. They subsequently sued to establish their rights as heirs and to set aside the sale-deed, and it was held that the plea of *res judicata* failed, as the title on which they sued in the second suit had not been alleged or denied in the previous suit and was not matter which might and ought to have been made ground of attack in the former suit. In this case it was said that the law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. In *Kandunni* v. *Kalyanma*, I. L. R. 9 Mad. 251, the plaintiff's suit on a demise of 1856 having been dismissed, it was held he was not estopped from suing for the same land on a demise of 1865.

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defence is a stronger case than the omission to put it forward at all. This waiving or abandoning a ground of attack or defence was also made a basis of the decision in the cases antecedently quoted and which are to be found at 7 Mad. H. C. Rep. 160, 263; and 11 B. L. R. 169.

In connection with the subject-matter of Explanation II we may read section 43[7] of the Civil Procedure Code, which is as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action. *Illustration*—A lets a house to B at the yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. A sues B only for the rent due for 1882. A shall not afterwards sue B for the rent due for 1881."[8] The case of *Grimbley* v. *Aykroyd* (1 Exch. 407 : 12 Jur. 257) is usually cited to illustrate the principle contained in the first portion of this section. This case was decided upon the 63rd section of the English County Court Act, 9 and 10 Vict. cap. 95, which enacts that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts; but any plaintiff, having cause of action for more than the pecuniary limit of jurisdiction, may abandon the excess, and the judgment recovered shall be in full discharge of all demands in respect of such cause of action. The facts were as follow:—A railway contractor, the defendant, had given orders to a grocer, the plaintiff, to supply with goods the workmen engaged on the works. A separate action was brought for the supplies to each workman; but it was held that the demands could not be so split, and that the supplies to all the workmen should be included in a single suit; that "cause of action" means in general "cause of one action," and is not limited to an action on one separate contract. *Pol-*

Suit to include whole claim.

Relinquishment of part of claim.

Omission to sue for one of several remedies.

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[7] This corresponds with section 7 of the old Code, Act VIII of 1859, which was as follows:—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff *relinquish or omit* to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

[8] Whether arrears of rent for successive years are several and distinct causes of action, in respect of which separate suits may be instituted, is a point on which the decisions were conflicting. The question has now been set at rest by the *Illustration* to the above section, which treats a claim to all arrears of rent as a single cause of action. See *Tarak Chandra Mukharji* v. *Panchu Mohini Debya*, I. L. R. 6 Calc. 791 : 8 C. L. R. 297 : *Narain Kumari* v. *Raghu Mahapatro*, I. L. R. 12 Calc. 50 : *Madhu Prakash Misr* v. *Murli Manohar*, I. L. R. 5 All. 406.

lock, C.B., said, that the Judges were agreed that the section applied "to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand." It was elsewhere remarked of this case that there was one entire *prevenient* governing contract of which the respective deliveries were merely the execution—the *overt* acts. In *Bonsey* v. *Wordsworth* (18 C.B. 325) it was held that a tradesman's bill for a series of articles delivered continuously cannot be split into different causes of action—See to the same effect *Cassom Jooma* v. *Thucker Liladhur Kissowji*, I. L. R. 2 Bom. 570. Where more than one instalment of a promissory note were due, and one only was sued for, the judgment recovered in this suit was held to bar a further suit for the remaining instalments (*Mackintosh* v. *Gill*, 12 B. L. R. 37: 20 W. R. 358).[9] A wrongfully dispossessed B and kept him out of possession during the years 1273, 1274, and 1275. B successfully sued to recover possession and also to obtain *mesne* profits for the years 1274 and 1275. Subsequently, B brought another suit to obtain *mesne* profits for the year 1273. It was held that the cause of action in respect of the *mesne* profits of the three years was one and the same; that therefore the cause of action had been split, and the second suit could not be maintained (*Rukmini Koer* v. *Ram Tohal Rai*, 21 W. R. 223). A alleged that he had obtained from B a *mukarrari* tenure of a four-anna share of a certain *mauza*. A tenant in this *mauza* deposited his rent in the Collectorate. A claimed Rs. 23 odd as his share of this rent, but the Collector refused to pay this amount to him, as B denied his *mukarrari* right. A then brought a suit against B and the tenant to recover Rs. 23 so claimed by him. Being unable to prove his *mukarrari* title, he applied for and obtained permission to withdraw the suit with leave to sue again. He then brought another suit against B, asking for a declaration of his title, which he obtained, but not asking for the Rs. 23. He subsequently sued B for the Rs. 23; but it was decided that the cause of action was the same as in the previous suit, and that having omitted to claim the amount therein, he could not afterwards sue for it (*Lachman Sahai* v. *Ramsaru Pandyain*, 20 W. R. 144).

A mortgaged certain property to B, who under the terms of the mortgage-deed was to be put in possession and to enjoy the profits. A however refused to give possession, and kept B out of possession for two years, whereupon B sued A for specific performance of the contract for possession, and obtained a decree. After this B sued A for the *mesne* profits of those two years. A Full Bench of the Allahabad High Court held that this second suit could not be maintained, as B, in addition to his prayer for specific performance, might in the first suit have asked for those *mesne* profits as damages for the breach of contract, and as the claim for possession and *mesne* profits were in respect of the same cause of action, namely, the breach of the contract

[9] In this connection see the case of *Umrao Lal* v. *Bihari Singh*, I. L. R. 3 All. 297; the facts of which are, however, distinguishable from those of the case above cited.

to give possession (*Lalji Mal* v. *Hulasi*, I. L. R. 3 All. 660). A purchased from B the right of the latter to certain shares in an estate as heiress of her father and of brother. C purchased the whole estate at sales in execution of decrees against the heirs of B's brother other than B. A then successfully sued C for the share to which B was entitled as heiress of her brother. A subsequent suit by A against C to recover the share to which B was entitled as heiress of her father was held barred by the section of the Code (*Shafkat-Unnissa* v. *Shib Sahai*, I. L. R. 4 All. 171). See also the following cases:—*Debi Dyal Singh* v. *Ajaib Singh*, I. L. R. 3 All. 543 (First suit for land and the trees thereon; second suit for the value of the fruit of the trees): *Benarsi Das* v. *Bhikhari Das*, I. L. R. 3 All. 717 (Rs. 800 found due on an account stated; written agreement to pay in four annual instalments; suit for first instalment withdrawn with leave to sue again for original debt, as agreement inadmissible for want of stamp; successful suit for two instalments; subsequent suit for third instalment held not maintainable, as the whole of what was due on the account stated should have been claimed in second suit): *Ukha* v. *Daga*, I. L. R. 7 Bom. 182 (Family property consisted of land and debts; first suit for partition of debts; second suit for partition of land not maintainable): *Sheo Sankar Sahai* v. *Hridai Naram*, I. L. R. 9 Calc. 143: 12 C. L. R. 34[1] (First suit in June 1879 to recover damages for 1283 F. S. (1275-6) for breach of contract to give possession of certain lands; second suit in June 1880 for similar damages for 1284, 1285 and 1286 F. S. (1876-7 to 1878-9) held not maintainable as regarded 1284 and 1285): *Bhau Baloji* v. *Hari Nilkanthrav*, I. L. R. 7 Bom. 377 (First suit between agriculturist mortgagor and his mortgagee for an account merely; second suit for possession on payment of the money declared to be due).

The second suit will be equally barred, whether the relinquishment of a portion of the claim in the former suit was a deliberate act or the result of accidental or involuntary omission (*Bazlur Rahim* v. *Shamshunissa Begam*, 8 W. R. P. C. 12, reversing the decision in Marsh. Rep. 286: *Gonesh Chandra Chaudhri* v. *Ram Kumar Chaudhri*, 3 B. L. R. A. C. 265). It is to be observed that the consequence of not suing for the whole of the claim is not that the suit cannot be entertained for so much as the plaintiff sues for, but that he cannot afterwards sue for what he has omitted (*Parsan Gopal Pal Chaudhri* v. *Purnanand Mallik*, 21 W. R. 272, *per Couch, C. J.*)

In the case of *Abhiram Das* v. *Sriram Das* (3 B. L. R. 421) the plaintiff sued to recover certain property alienated by two Hindu widows, alleging that the surviving widow was unchaste and that the deed of alienation was fraudulent. He had before sued for the same property, alleging both widows to be dead, and had failed. It was held that the second suit was not maintainable, *Markby, J.*, observing:—"With regard to the fraud in the *kabala*, I think that was a matter which the plaintiff was bound to include in his former suit, for it would be distinctly splitting his cause of action if he was allowed to take that ground now for the first time." It will be

[1] Affirmed in appeal by the Privy Council. See I. L. R. 12 Calc. 482.

observed that, in this case, that which was made the cause of action in the second suit was in existence and might have been put forward when the first suit was brought. It is in this respect to be distinguished from *Channu Lal Sahu* v. *Manu Lal* (5 B. L. R. 220). Here A and B were joint owners of certain property. In the execution of one decree the interest of A was sold and purchased by C. In the execution of another decree the interests of A and B were sold and purchased by D. In a suit by A to have the sale to C set aside, A succeeded in the lower Court, but on appeal a compromise was effected and the sale allowed to stand good. D, relying upon his purchase, sued for possession of the shares of A and B, but obtained a decree for B's share only, the Court remarking that so long as the sale of A's share to C remained unreversed, D could not recover this share. D upon this brought a second suit to have that sale reversed, and it was held that this suit could be maintained. *Markby, J.*, referring to the former case, said—"In that case the plaintiff had, at the time when the suit was first brought, a complete title to recover the property he sued for; the only difference was a difference in the way that title was to be established. Here the decision, or order, by which the plaintiff's suit as to A's share was dismissed, was in effect that, so long as the defendant C held the sale-certificate, no other person could get a title to that property. It is to get rid of that very sale that the plaintiff brings this suit." It does not appear very clearly from the published report whether, when D brought his first suit, the decree of the lower Court reversing the sale in the suit between A and C was in force; or whether C was a party to D's first suit, or any issue was decided in that suit as between D and C.

A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she sued for arrears of maintenance at the rate fixed in the decree of 1876; but it was held that the suit would not lie. In her previous suit she had sued for future maintenance and the decree she had obtained was incapable of execution. She therefore could not sue again for a relief which she might have obtained in her previous suit.—*Venkanna* v. *Aitamma*, I. L. R. 12 Mad. 183.

Other cases in which no splitting of cause of action.

In the case of *Kuran Singh* v. *Mahomed Fyaz Ali Khan* (14 Moo. I. A. 188) the plaintiff sued to set aside a mortgage granted by the widow and mother of a deceased Hindú. There had been a former case brought against various defendants to impeach certain alienations made by the same ladies, by which the inheritance subject to their interest was transferred to certain near relations so as to exclude the remoter heirs. It was contended that this section barred the second suit. The Privy Council were of opinion that the true test of the proper application of the section to any particular case must be whether there has been a splitting of the cause of action; and it is therefore necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action. . . . . .

It appeared to their Lordships that the causes of action in the two cases were essentially different. In the one case the widows, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the defendants in the first suit. In the other case the issue was whether they had duly exercised the limited power, which belongs to a Hindú female having a Hindu female's right of inheritance in the estate, of charging the estate for certain defined purposes. The cause of action in the two cases was therefore held to be distinct. See also *Sadaya Pillai* v. *Chinni*, I. L. R. 2 Mad. 352. Again, A and B were co-sharers in joint property. In 1861 A sued B for partition (*i.e.* by metes and bounds, not mere division of the right), omitting to include in his claim a certain field, which was then in the possession of a mortgagee. B subsequently redeemed this field and mortgaged it to C. A then brought a suit to recover his share of this field. It was held that there had been no splitting of the cause of action, for this field was not available for actual partition when the first suit was brought (*Narayan Bábáji Dábholkar* v. *Pandurang Rámchandra Dábholkar*, 12 Bom. H. C. Rep. 148). The purchaser of certain land brought a suit to obtain and did obtain a decree declaring his title. He brought a subsequent suit to obtain possession. At the time of bringing the first suit he was out of possession, and did not, up to the time of bringing the second suit, obtain possession. It was held that there was nothing to bar the second suit, as the cause of action put in suit on the former occasion did not necessarily involve any breach of the contract to deliver possession, and a declaratory decree might have been obtained without entering on the question of possession (*Tulsi Ram* v. *Gangaram*, I. L. R. 1 All. 252: see also p. 280 *note*). A suit was brought to recover accreted land. A second suit was subsequently brought to recover a further accretion which had taken place after the date of bringing the first suit. There was held to have been no splitting of the cause of action (*Pahalwan Singh* v. *Mahesar Baksh Singh*, 9 B. L. R. 169). A suit was withdrawn with permission to sue again, as a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint. A fresh suit was instituted, the portion so omitted being included. It was objected that, as this portion had been omitted in the former suit, it could not be claimed in the second suit; but the objection was rejected (*Ilahi Baksh* v. *Imam Baksh*, I. L. R. 1 All. 324).

Two suits to recover rent due for two successive years under the same lease were instituted on the same day in a Small Cause Court, the sum of the two claims exceeding the pecuniary limit of the Court's jurisdiction. The suit for the rent of the first year was dismissed under section 43, on the ground that the claim ought to have been included in the suit for the second year's rent. The Madras High Court, while affirming the principle of the decision, allowed the plaintiff to withdraw both suits, and to file one suit in a competent Court.—*Alagu* v. *Abdula*, I. L. R. 8 Mad. 147. But see *contra*, *Kalleshar Prasad* v. *Jagannath*, I. L. R. 1 All. 650.

See also the following cases :—*Lachman Singh* v. *Sanwal Singh*, I. L. R. 1 All. 543 (First suit by A, one heir, against B, C and D, other heirs, to obtain share in a mortgage valued at Rs. 5,600, the amount lent; second suit by A against B, C and D for share of Rs. 8,624 realized by them under this mortgage but fraudulently concealed from A when first suit was brought) : *Umed Dholchand* v. *Pir Saheb Jiva Miya*, I. L. R. 7 Bom. 134 Two bonds *alleged* to have been given in respect of one claim) : *Manohar Lall* v. *Gauri Shankar*, I. L. R. 9 Calc. 283 : 12 C. L. R. 434 (First suit for mesne profits; second suit for possession of the land) : *Jibanti Nath Khan* v. *Sibnath Chakravartti*, I. L. R. 8 Calc. 819 : 10 C. L. R. 537 (First suit for declaration[2] of title dismissed on ground that plaintiff was out of possession; second suit for possession held maintainable) : *Radhanath Kundu* v. *Land Mortgage Bank of India, Limited*, I. L. R. 6 Calc. 559 : 8 C. L. R. 10 (Both suits to have property declared liable to be sold in execution, but to set aside orders made in separate execution-proceedings under different decrees) : *Krishto Das* v. *Ram Kanth Rai Chaudhri*, I. L. R. 6 Calc. 142 (First suit against mortgagor to have lien upon mortgaged properties declared; second suit against attaching-creditors of mortgagor to have declaration of lien upon certain surplus sale-proceeds in the hands of the Collector, who, before the first suit, had sold some of the mortgaged properties for arrears of revenue) : *Bhagran Acharjya* v. *Gobind Sahdi*, 11 C. L. R. 355 (First suit to foreclose mortgage and obtain possession after expiry of year of grace; other members of defendant's family intervened; suit withdrawn on understanding that if fresh suit instituted against all, they would all assent to a decree; fresh suit was instituted, defended and dismissed in consequence: a further suit to recover the money lent on mortgage was held maintainable—but see now the last clause of section 43 of the Code of Civil Procedure, and section 99 of The Transfer of Property Act IV of 1882) : *Akhai Kumar Chattapadhya* v. *Mahtab Chandra*, I. L. R. 5 Calc. 24 (First suit for abatement of *patni* rent on account of diminution of area in consequence of land having been taken up for public purposes; second suit for refund of rent paid in excess of the amount justly payable) : *Shaldpa Hadldpa* v. *Baldpa Lokanna*, I. L. R. 7 Bom. 446 (Bond for repayment of loan on a certain date further provided that loan if not then repaid might be added to an existing mortgage for a term of years and repaid at end of

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[2] In *Kalidhan Chattapadhya* v. *Sibnath Chattapadhya* (I. L. R. 8 Calc. 483 : 11 C. L. R. 57), the plaintiffs had, in a previous suit, obtained a decree declaring them entitled to an account, but had neither asked nor obtained consequential relief. No account having been rendered, the plaintiffs brought a further suit "for the amount of such Company's papers and other debts that might be found due by the defendant on an adjustment of accounts." A Full Bench of the Calcutta High Court held this second suit maintainable, regard being had to section 15 (now repealed) of the Old Code, Act VIII of 1859, which must be taken to modify section 7 (*ante*, p. 275, *note*). The whole principle was fully discussed in this case. See *Tulsi Ram* v. *Gangaram*, *ante*, p. 279, to which reference was here made. See also *Saraswati* v. *Kunj Bihari Lal*, I. L. R. 5 All. 345 (First suit for declaration of title successful; second suit for possession held by a Full Bench to be maintainable, regard being had to the provisions of the old Code).

term; loan not paid on such date; first suit for interest on loan to date of such suit; second suit for subsequent interest): *Subbayya* v. *Venkatesappa*, I. L. R. 6 Mad. 49 (First suit to cancel a release obtained by decrees and recover amount due on settlement of account made 1st July 1878; second suit to wind up partnership entered into after settlement): *Venkata Viraraghavayyangar* v. *Krishnasami Ayyangar*, I. L. R. 6 Mad. 344 (First suit to enforce mortgage lien against land; second suit to enforce right to money lodged in the treasury as compensation for a portion of the land acquired by a railway company, the fact of such acquisition not having been known to plaintiff at time of instituting first suit): *Banda Hasan* v. *Abadi Begam*, I. L. R. 4 All. 180 (Lease by usufructuary mortgagee to mortgagor; first suit for rent in the Revenue Court; subsequent suit in Civil Court to enforce lien): *Inami Begam* v. *Gobind Prasad*, I. L. R. 4 All. 318 (*id.*): *Ram Taran Kundú* v. *Hossein Baksh*, I. L. R. 3 Calc. 785 (Plaint amended): *Peari* v. *Khiali Ram*, I. L. R. 3 All. 857: *Pestonji Bezonji* v. *Abdul Rahiman bin Shaik Budu*, I. L. R. 5 Bom. 463.

Lands in respect of which there was one and the same cause of action were situated within the local jurisdiction of different Courts. A suit having been brought in respect of the land in one jurisdiction, and a subsequent suit in respect of the land in another jurisdiction, the latter was held not to be barred because sanction had not been obtained under sections 11 and 12 of Act VIII of 1859 for the disposal of the whole claim by the Court in which the first suit was brought (*Takur Persad* v. *Kalika Persad*, 2 N. W. P. Rep. 104). The Calcutta High Court took a different view in *Jamúna Dasi Chaudhráni* v. *Bama Sundari Dasi Chaudhráni* (2 W. R. 148), where it was observed, that the effect of bringing two suits instead of one was to deprive the defendant of the right of appeal to the Privy Council, which she otherwise would have had; but see *Girish Chandra Mukharji* v. *Ramessuri Debi*, 22 W. R. 308, and *Bangsi Singh* v. *Sudist Lall*, I. L. R. 7 Calc. 739: 10 C. L. R. 271. Under the existing Code of Civil Procedure no sanction is required for the trial in any particular Court of a suit brought to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district but within the jurisdiction of different Courts. Such a suit may be instituted *in the Court within whose jurisdiction any portion of the property is situate*, provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court. If the immoveable property be situate within the limits of different districts, the suit may be instituted *in any Court otherwise competent* to try it, *within whose jurisdiction any portion of the property is situate* (section 19). As to the application of this section to execution-proceedings, see *Sarup Chandra Guhu* v. *Amirunnissa Khatun*, I. L. R. 8 Calc. 704.

The widow of a deceased Muhammadan alienated different portions of her husband's property to different persons at different times and by distinct conveyances. The other heirs brought a suit against the widow and one alienee to set aside the alienation of one portion. On their bringing a second suit against the widow and another alienee to set aside the

alienation of another portion, section 7 of the old Code of Civil Procedure was pleaded; but it was decided that it did not apply. Although the plaintiffs sued under the same title, *viz.*, by inheritance, in both cases, it was held that each alienation under the circumstances constituted a separate cause of action (*Jahan Bibi* v. *Saivak Ram*, 1 N.-W. P. Rep. F. B. 109). Having reference to section 8 of the same Code, it may be observed that, although the widow was here a party to both suits, the cause of action in the first suit was *against the widow and one alienee*, and the cause of action in the second suit was *against the widow and another alienee*. Not being causes of action *against the same parties*, it might be contended that they could not be joined even under the permissive provisions of section 7 of the Code of 1879; and this seems to have been the ground of decision in *Sabir Khan* v. *Kali Das De* (1 W. R. 199). Here A, B, C and D were joint owners of a *taluk*. Default was made in payment of the rent of 1264 B. S., and the *taluk* was in consequence sold. A had not been registered as a sharer, and when he applied to the Collector for a share of the surplus sale-proceeds, which remained after satisfying the arrear for which the sale was made, the Collector required him to establish his interest in these proceeds by a civil suit, and he accordingly brought a suit against B, C, and D for this purpose and obtained a decree for a two-anna share of the surplus sale-proceeds. Besides the arrears of 1264 B. S., for which the *taluk* was sold, the *zamindar* held decrees for the rent of 1263 B. S., which were also satisfied out of the sale-proceeds. A, alleging that the rent on his share for 1263 had been paid, and that the arrears due by B, C, and D for that year had been satisfied out of the sale-proceeds, brought a second suit to recover the amount, in proportion to his share, by which the available sale-proceeds were diminished in consequence of the payment therefrom of the rents of 1263. It was contended that he should have included this in his former claim; and, not having done so, that he was barred by section 7. A had, however, purchased his two-anna share in 1265 at a sale in execution of a decree. It was remarked that his remedy in the second suit might be not only against B, C, and D, but also against the former proprietor of the two-anna share, and also against the zamindar. The causes of action in the two suits not being, therefore, *against the same parties*, the second suit was decided to be maintainable.—See also *Rajaram Tewari* v. *Lachman Prasad*, B. L. R. Sup. Vol. F. B. 731. In *Tarini Persad Ghosh* v. *Khudumani Debi* (5 B. L. R. 184: 13 W. R. 261) the two suits were brought by the same plaintiff *against the same defendant*. In *Haranand Mazumdar* v. *Prasanno Chandra Biswas*, (I. L. R. 9 Calc. 763: 12 C. L. R. 556,) certain properties, which had been sold to A by private contract, were attached in execution of a decree against A's vendors, brought to sale, and bought by various purchasers. It was held that A had properly brought one suit for the recovery of all the properties against his vendors, the decree-holder who had brought about the execution sale, and all the various purchasers. This case, in which all the defendants had but one defence, namely, that the plaintiff's purchase was invalid, was distinguished from *Rajaram Tewari*

v. *Lachman Prasad* in which it was observed that the defendants claimed under different titles and their respective cases depended upon wholly diverse evidence and considerations. In the case of *Vithu* v. *Narain Dabhalkar* (5 Bom. H. C. Rep. A. C. 30) a Hindu, whose share in an ancestral estate had been alienated by a co-proprietor to different persons, brought three suits simultaneously against the co-proprietor and the alienees to recover three distinct parcels of land. It was decided that, although the plaintiff had only one cause of action against the co-proprietor, and therefore ought to have brought one suit against him, including all the alienees therein, or brought separate actions against the alienees and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined, yet, inasmuch as the suits against the co-proprietor were instituted simultaneously, the error in splitting up the claim against him did not affect the merits or the jurisdiction of the Court. In *Kachar Bhoj Vaija* v. *Bai Rathore* (I. L. R. 7 Bom. 289), a similar suit was held to have been improperly brought by a reversioner against a Hindu widow and several persons to whom she had aliened portions of the family property. There was also in this case a prayer to restrain the widow from further alienations. In *Pragji Rudarji* v. *Endarji Bhimbhai* (9 Bom. H. C. Rep. 257) the plaintiff sued his grandmother, A, and one C, for some trees which he claimed by right of inheritance from his grandfather, but which A had sold to C. He had before sued A and B for a piece of land, which he claimed by the same right of inheritance, but which A had sold to B. The High Court held that the causes of action were different in the two suits, namely, the unlawful alienations by A of different properties. The Madras High Court has taken a different view. In *Sami Chetti* v. *Ammani Achy* (7 Mad. H. C. Rep. 260), the plaintiff's father had died seventeen years before, and his three widows had aliened the whole of the estate by degrees to twenty-eight different persons. Plaintiff brought one suit against the three widows and these twenty-eight persons. The District Judge dismissed it on the ground of misjoinder of persons and causes of action; but this dismissal was reversed by the High Court, *Holloway, Acting C. J.*, remarking:—"This suit has been dismissed upon the favourite ground of misjoinder. No practitioner of this Court would have thought of making he objection, as such suits are of daily occurrence. The Judge says that the cause of action against each of the purchasers is a distinct one. The plaintiff claims his share of family property. His cause of action, the right, is his relation to the family to which the property appertains and on this right, if established, and if he is not otherwise barred from recovering, he will be entitled to that share wherever found. The fact that various persons during his minority have affected to purchase parcels of the property does not destroy the unity of his ground of action." This view was followed in *Vasudeva Shambhaga* v. *Kuleadi Narnapai*, 7 Mad. H. C. Rep. 290: and *Cutti Udaiyan* v. *Canagappa Udaiyan*, *id.* 292. Section 42 of the Code of Civil Procedure now enacts that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the

subject in dispute, and so to prevent further litigation concerning them; and section 28 enacts that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment. See *Bangsi Singh* v. *Sudist Lall*, I. L. R. 7 Calc. 745: *Badri Das* v. *Hoare, Miller & Co.*, I. L. R. 8 Calc. 170: *Rajdhar Chaudhri* v. *Kali Krishna Bhattacharjya*, I. L. R. 8 Calc. 963: *Narsingh Das* v. *Mangal Dubey*, I. L. R. 5 All. 163.

The effect then of sections 13 and 43 of the Code of Civil Procedure is, that when one or more persons have a single cause of action against one or more, the whole of the claim arising out of that cause of action must be included in a single suit. If the plaintiff, having omitted any portion, proceed to judgment and decree for the rest, he loses for ever his remedy in respect of the portion so omitted.

Consequence of some of those entitled to sue being omitted as plaintiffs.

Having seen the result of omitting to sue for a portion of a claim and of omitting to ask for one of several remedies which may be had in respect of the same claim, let us now see what will be the consequence (1) of one or more of those entitled to sue being omitted from the suit as plaintiffs; and (2) of one or more of those who may be sued being omitted from the suit as defendants. The Code of Civil Procedure provides (section 26) that all persons *may be joined* as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment (see *Lingammal* v. *Chinna Venkatammal*, I. L. R. 6 Mad. 239). Section 31 enacts that no suit shall be defeated by reason of the *misjoinder* of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.—See *Nusserwanji Merwanji Panday* v. *Gordon*, I. L. R. 6 Bom. 266. Section 32 is as follows:—"The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be *struck out*; and the Court may, at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and *that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.*[2] No person shall be added as a plaintiff,

[2] For instances of the application of these provisions, see *Mahomed Badsha* v. *Nicol Fleming*, I. L. R. 4 Calc. 355: *Mohendro Bhusan Biswas* v.

or as a next friend of a plaintiff, without his own consent thereto." If the non-joinder of necessary plaintiffs be not corrected under these provisions, the Code does not declare what the consequence shall be, and the law on this subject is only to be gathered from the decided cases. Where three out of four joint *sebaits* of a family endowment sued to set aside an alienation of the endowed property made by the fourth *sebait* in favour of the defendants and to recover possession of the property so alienated, it was held that the fourth *sebait* was under the circumstances a necessary party to the suit, and that, as he had not been made either a plaintiff or defendant, it must be dismissed, since complete justice could not be done in his absence (*Rajendronath Dutt* v. *Mahomed Lal*, L. R. 8 I. A. 135 : I. L. R. 8. Calc. 12). In *Ram Sebak* v. *Ram Lal Kundu* (I. L. R. 6 Calc. 815 : 8 C. L. R. 457), it was laid down broadly that, in actions of contract, it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he has contracted being joined as plaintiffs; and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. The facts of this case were these:—A joint Mitakshara family, consisting of (1) a father, (2) his three sons, and (3) the widow and sons of a deceased son, carried on business in partnership. A sum of money was due to this partnership on a *hathchitta*, dated the 11th December, 1876. The last payment made and entered by the defendant (see section 20 of the Limitation Act) was dated the 20th July, 1877. No time was fixed for payment of the amount of the *hathchitta*, which was therefore payable on the date of the document. Two of the three sons instituted a suit on the 19th July, 1880, to recover the balance due after deducting the payments made. This suit came on for hearing on the 26th July, when objection was taken for non-joinder of plaintiffs. Upon the application of the original two plaintiffs, the names of the father and third son were then added, and the plaintiffs were described as surviving partners of the deceased son. As regards the plaintiffs so added the suit was on this date barred by the three years' rule of limitation: and it was held that, as the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, who were barred (see section 22 of the Limitation Act, XV of 1877 and paragraph 5 of section 32 of the Code of Civil Procedure), the suit must be dismissed. To the same effect is *Kalidas Kevaldas* v. *Nathu Bhagvan*,*

Shashi Bhusan Biswas, I. L. R. 5 Calc. 882 : *Chandra Kumar Rai* v. *Gokul Chandra Bhattacharjya*, I. L. R. 6 Calc. 370 . *Dwarkanath Pal* v. *Girish Chandra Bandapadhya*, I. L. R. 6 Calc. 827 : *Naraini Kuar* v. *Durjan Kuar*, I. L. R. 2 All. 738 : *Vydianadayyan* v. *Sitaramayyan*, I. L. R. 5 Mad. 52 : *Byreddi Narakka* v. *Narayana Reddi*, I. L. R. 6 Mad. 331 : *Edulji Muncherji Wacha* v. *Vullebhoy Khanbhoy*, I. L. R. 7 Bom. 167.

* With these cases compare *Bangsi Singh* v. *Sudist Lal* (I. L. R. 7 Calc. 739 : 10 C. L. R. 264), in which it was held that one partner, *with whom personally a contract was made*, could sue alone without joining his co-partners.

I. L. R. 7 Bom. 217. In *Kattusheri Pharath Kanna Pisnarody* v. *Vallotil Manakel Narayanan Somaya Jipad* (I. L. R. 3 Mad. 234), it was laid down that all the co-owners must join in a suit to recover property, unless the law otherwise provides, and if some of them refuse to join as plaintiffs, the proper course is to make them defendants. A *patni taluk*, belonging to several co-sharers, each of whom collected his own share of rent, was sold for arrears of the *patni* rent. One co-sharer brought a suit in a Munsif's Court to recover possession of his share by setting aside the sale. He valued the suit according to his share and made the other co-sharers defendants. It was held that the suit could not be maintained in this form; that the cause of action was the sale of the whole estate and the suit should have been framed and valued accordingly, and brought in a Court in which the rights of all parties interested in setting aside the sale might have been declared in one suit (*Annoda Persad Rai* v. *Erskine*, 12 B. L. R. 370). A, B, C, D. and E were joint lessees of a Government estate, which was sold for arrears of revenue. They each brought separate suits to set aside the sale as to their respective shares. It was decided that this could not be done, and that the defendants were not to be harassed by five different suits. (*Biswanath Bhattacharjya* v. *The Collector of Maimensingh*, 7 B. L. R. App. 42). In *Bedar Bakht Muhammad Ali* v. *Kharram Bakht Yahya Ali Khan* (19 W. R. 315), the Privy Council strongly intimated that the heirs of a Muhammadan cannot separately sue a debtor to the estate. "It cannot be contended," said their Lordships, "that a debtor to a Muhammadan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt." Under the old rent law in Bengal, when rent was payable to the co-owners of an estate jointly; when the tenant had not expressly agreed to pay each co-owner his share of the rent separately; when no co-owner had been in the habit of collecting his share separately, from which practice such an agreement might be implied—one co-owner could not maintain a suit for his separate share of rent.[6] Under the present rent law, joint landlords when doing anything required or authorized to do by the Act (VIII of 1885) must act collectively or by common agent (s. 188, Act VIII of 1885).

One or more allowed to sue or be sued on behalf of a large number.

It sometimes happens that the number of persons interested is so large that it would be extremely inconvenient, if not impossible, to make them all plaintiffs or defendants. When, therefore, the interests of all the members of a class are identical, when they all stand in the same situation and have a common right as well as a common interest, one or more of them may, with the permission of the Court, sue or be sued on behalf of all (section 30, C. C. P.: and see *The Oriental Bank Corporation* v. *Gobind Lal Seal*, I. L. R. 9 Calc. 604. *Dharam Singh* v. *Kishen Singh*, 9 C. L. R. 410 and *Jan Ali* v. *Atawar Rahman*, 9 C. L. R. 433). Compare *Thanakoti* v.

[6] The rulings on the subject both under the old law and under the present Act will be found collected in the note to s. 188 of Rampini and Finucane's Bengal Tenancy Act, 2nd edn.

Maniappa, I. L. R. 8 Mad. 496. Any one of those interested may, however apply to the Court to be made a party to the suit (section 32, *id.*). When persons litigate in this manner *bonâ fide* in respect of a private right claimed in common for themselves and others, the matter will be *res judicata* as concerns all persons interested (Explanation V. *ante*, p. 237).

We have next to consider what will be the consequence of omitting from the number of defendants some of those who may be sued. Section 28 of the Code of Civil Procedure, as we have seen (*ante*, p. 284), allows all persons to be joined as defendants against whom the right to *any relief* is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter. Section 29 provides that the plaintiff may, at his option, join as parties to the same suit all or any of the persons *severally, or jointly and severally, liable on any one contract*, including parties to bills of exchange (*Pestonji Edulji Gurdur* v. *Mirza Mahomed Ali*, I. L. R. 3 Calc. 541), *hundis* and promissory notes. Section 32 gives, as has been explained, full opportunity of adding defendants at any time during the progress of the suit. If, however, these provisions have not been utilized, and if the suit have proceeded to decree against some only of those liable, can those who have been omitted as defendants be made liable in a subsequent suit? English Courts of Equity usually required that all the parties liable should be made defendants in order to avoid suits for contribution. At Common Law the non-joinder as a defendant of a person liable could be taken advantage of by a plea in abatement; but if judgment were recovered against one of two or more joint debtors, such judgment, even without satisfaction, would be a bar to an action against the other or others (*King* v. *Hoare*, 13 M. and W. 494). See also *Kendall* v. *Hamilton* (39 L. T. N. S. 250), where the plaintiff had made advances to W. M. & Co. in respect of transactions in which the defendant, a dormant partner, was jointly interested. Plaintiff having become aware of the defendant's interest, sued and obtained a decree against W. M. & Co., who became bankrupt before the decree was satisfied. This decree was held to be a bar to a subsequent suit brought by the plaintiff against the defendant to recover the advances. A judgment in favour of one was, however, held to be no defence to a subsequent action against the others when it did not appear that such judgment was obtained on a ground which operated as a discharge of all (*Phillips* v. *Ward*, 2 H. and C. 717). In the case of *joint and several* debtors a judgment recovered *with satisfaction* against one would be a bar to an action against the others, but otherwise if the judgment had not been satisfied. Judgment recovered against one of two or more persons, who have jointly committed a tort, will even though unexecuted be a bar to an action against the others (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 7 C. P. (Ex. Ch.) 547). The general subject is one upon which there is some lack of authority in India. In *Nathu Lal Chaudhri* v. *Shankr Lal*, 10 B. L. R. 200; 18 W. R. 458, A lent money to B and C, who executed a bond mortgaging certain

Consequence of some of those who may be sued being omitted as defendants.

lands as security for the loan. The money not having been paid, A sued B and C, and obtained a decree against them. In execution of this decree he attached certain joint family property belonging to B, C, D, and E. The shares of D and E, were released from attachment, as they were not judgment-debtors under the decree. The whole amount due not having been realized by the sale of the shares of B and C, A brought a second suit against D and E in order to have their shares made liable to his claim on the ground that they were jointly liable with B and C, as all four formed one joint family and the money had been borrowed for the use of such family by B and C acting as managers. It was held that this second suit could not be maintained. *Couch, C. J.*, said :—"The bond must be either a bond of the two and a mortgage of the shares of the two only, or the joint bond of the family. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they had already sued the two, and recovered a portion of the money from them ; and they cannot sue other persons not bound by it. But if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others ; and they have got a decree upon the bond, the cause of action being the non-payment of the money which the parties were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract—and that is all this can be—and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable but were not included in the former suit." This case was followed in *Hemendro Kumar Mallik* v. *Rajendro Lal Munshi* (I. L. R. 3 Calc. 353), where the principle of *King* v. *Hoare* and *Brinsmead* v. *Harrison* was deliberately adopted. To the same effect are *Rup Lal Mallik* v. *Rajendro Narain*, 1 C. L. R. 488 : *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti*, I. L. R. 5 Mad. 37 ; and *Chockalinga Mudali* v. *Subbaraya Mudali*, I. L. R. 5 Mad. 133; and see *Dhanpat Singh* v. *Sham Sundar Mitra*, I. L. R. 5 Calc. 291. In *Abdur Rahman* v. *Ganesh Lal*, (23 W. R. 444,) it was held that the drawer, acceptor, and intermediate indorsers of a dishonoured *hundi* are not liable jointly, but that their liability arises out of different contracts : and that therefore a decree obtained against one of them is not a bar to the maintenance of a suit against another of them.

In *Nobin Chandra Rai* v. *Magantara Dasya*, I. L. R. 10 Calc. 924, one only of two persons, joint-owners of a property, had been sued for a debt, for which the property had been pledged by the person sued. A decree was obtained and execution taken out. In the course of the execution-proceedings the other sharer put in a claim and got her share in the property released from attachment. The judgment-creditor then brought a second suit against both sharers, for the purpose of making the share of the co-sharer who had not previously been sued liable to satisfy the debt due to him, and it was held that the suit would lie and was not barred.

II. In the second place, the matter must have been *heard and finally decided* in the former suit. In *Chandra Sikhar Deb Rai* v. *Durgendra Deb* (3 W. R. 39), *Phear, J.*, said:—"In order to constitute a *res judicata* with regard to a plaintiff's claim it must have been raised by a previous suit in a Court competent to entertain it, and been *determined* by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it." There must have been a decision upon the matter alleged to be *res judicata*, which finally granted or withheld the relief sought in respect thereof (*Saikappa Chetti* v. *Kulanda Rúri Natchiár*, 3 Mad. H. C. Rep. A. J. 84).

Matter must have been heard and finally decided.

In the following cases, although there had been a decision on other points, the matter of the second suit had literally not been determined in the previous suit, and it was in consequence held that this matter was not *res judicata*:—*Kanai Lall Khan* v. *Sashi Bhúsan Biswas*, I. L. R. 6 Calc. 777: 8 C. L. R. 118 (Judge refused to decide representative title): *Pannu Singh* v. *Nirghin Singh*, I. L. R. 7 Calc. 1298. 8 C. L. R. 310 (Rate of rent not decided; but see *Hari Bihari Bhagat* v. *Pargan Ahir*, I. L. R. 19 Calc. 656): *Ishri Datt* v. *Har Narain Lal*, I. L. R. 3 All. 334 (First suit by assignee of bond failed, because deed of assignment was not registered; second suit by same person after obtaining and registering a fresh deed of assignment): *Abdul Majid* v. *Jew Narain Mahto*, I. L. R. 16 Calc. 233 (A sued B for rent. B pleaded that he was A's partner. B sued A for an account as a partner; A denied being a partner. The Munsif decided both suits together and held that A was not B's partner; B did not appeal in the rent-suit, but he appealed in the suit for an account. It was contended that because B had not appealed in the rent-suit the question as to A's not being his partner was *res judicata*. It was, however, held that this was not the case): *Ramireddi* v. *Subarreddi*, I. L. R. 12 Mad. 500 (First suit by assignee of a mortgage; bond dismissed for want of notice under section 132 of the Transfer of Property Act. The plaintiff then gave notice and sued again; the claim was held not to be *res judicata*).

Matter literally not previously decided.

When the matter, although decided by the Court of first instance or by the lower Appellate Court, was not decided by the last Court of Appeal, it has been held not to have been heard and finally decided, *Gánga Bissen Bhagat* v. *Raghunath Ojha*, I. L. R. 7 Calc. 381: 9 C. L. R. 34: *Imamudin* v. *Futteh Ali*, 3 C. L. R. 447: *Mokund Narain Deo* v. *Jonardan De Barnik*, 15 W. R. 208. (Questions of title and possession decided below; but question of possession only decided on appeal): *Chandra Kumar Mitra* v. *Sib Sundari Dasi*, I. L. R. 8 Calc. 631: 11 C. L. R. 22 (Question of liability of a tenure to enhancement not decided on appeal, although decided below): *Nilvaru* v. *Nilvaru*, I. L. R. 6 Bom. 110. In this

Decided below, but not on appeal.

last case it was said that, when judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res sub judice;* and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be, if that judgment had been reversed by the Court of Appeal.

Then, there is another class of cases in which the first suit failed on account of some technical defect, and there was no decision whatever on the merits—for example, where a demurrer was allowed (*Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. 181 : 7 C. L. R. 320 : I. L. R. 5 Bom. 48), where a suit was dismissed because a certificate of the Collector under section 6 of the Pensions Act, XXIII of 1871, which was necessary to give jurisdiction to the Court had not been obtained) *Putali Meheli* v. *Tulja*, I. L. R. 3 Bom. 223); and when a case was summarily dismissed on a preliminary point without being tried on the merits, it was held that this was no bar to a second suit (*Shukhi Bewah* v. *Mehdi Mandal*, 9 W. R. 327). So when the judgment in the first case had proceeded wholly on a *technical defect* or irregularity and not upon the merits of the case (*Ramnath Rai Chaudhri* v. *Bhagbat Mahapatro*, 3 W. R. Act X, 140) : and where the previous suit had been dismissed because the plaintiff had failed to give security for costs (*Rungrav Ravji* v. *Sidhi Mahomed Ebrahim*, I. L. R. 6 Bom. 482) : also where the first suit had been rejected on the ground that it was *improperly valued* (*Dullabh Jogi* v. *Narain Lakhi*, 4 Bom. H. C. Rep. A. C. 110) : *Mahomed Salim* v. *Nubian Bibi*, I. L. R. 8 All. 282 (where the first suit had been rejected because (1) the plaintiff had failed to pay additional Court-fees required by the Court, and (2) for misjoinder). And now generally the *rejection of a plaint* does not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action (section 56 of the Code of Civil Procedure). Where the previous suit was treated as one for a mere declaration of right, and dismissed with reference to section 42 of The Specific Relief Act, 1877, on the ground that the plaintiffs had omitted to sue for possession, this was held not to be a bar to a second suit brought to recover possession and to have a deed of gift set aside (*Ram Sewak Singh* v. *Nakched Singh*, F. B. I. L. R. 4 All. 261 : *Jibunti Nath Khan* v *Sibnath Chakravartti*, I. L. R. 8 Calc. 819 : 10 C. L. R. 537 : *Kamala Kamini Debya* v. *Loknath Kar*, 11 C. L. R. 183). Where an issue was decided under sections 9 and 11 of *The Indian Oaths Act*, one party having offered to be bound by the oath of the other, this was held not to be an adjudication which would have the effect of an estoppel in subsequent proceedings (*Keshava Tharagan* v. *Rudran Nambudri*, I. L. R. 5 Mad. 259). An opinion expressed *incidentally* and not amounting to a finding upon a distinct issue is not a final determination of the matter in question) *Sibnath Chatarji* v. *Nabo Kissen Chaturji*, 21 W. R. 189 : *Devarakonda Narasamma* v. *Devarakonda Kanaya*, I. L. R. 4 Mad. 134). A dismissal for want of jurisdiction (*Mahabir Singh* v. *Ram Bhajjan Sah*, I. L. R. 16 Calc.

Cases in which first suit failed on technical ground.

545), and even where there has been a decision upon the merits in the first suit, such decision, if the Court had not jurisdiction in the matter, will not bar a second suit (*Ram Gobind Jha* v. *Mangar Ram Chaudhri*, 13 C. L. R. 83). C became surety for the due payment of rent by B to his landlord, A. On default of payment, A sued B and C in the Revenue Court and obtained a decree, which, on appeal, was set aside as against C on the ground that the Revenue Court had no *jurisdiction* to pass a decree against the surety. This was held to be no bar to a subsequent suit in the Civil Court against C (*Ganesh Koer* v. *Umdat-an-nissa Begam*, 6 N.-W. P. Rep. 77). A second suit was held maintainable where a decree had been obtained which proved infructuous on account of non-jurisdiction (*Girish Chandra Mukharji* v. *Ramessari Debi*, 22 W. R. 308 : *Bangsi Singh* v. *Sadist Lall*, I. L. R. 7 Calc. 739 : 10 C. L. R. 264).

The dismissal of a suit on the ground of non-service of the summons on the defendant owing to the failure of the plaintiff to pay the Court-fee leviable for service, or the dismissal of the suit because of the non-appearance of either party on the day of trial, will not preclude a fresh suit (sections 97, 98, 99 of the Code of Civil Procedure). This rule was held to apply under the former Code to a case which had been remanded by an Appellate Court and there dismissed, as neither party appeared in the lower Court (*Raghunath Singh* v. *Ram Kumar Mandal*, 5 B. L. R. App. 64). The dismissal of a suit under section 102 of the Code of Civil Procedure for non-appearance was not intended to operate in favour of the defendant as *res judicata*. It imposes, however, when read with s. 103, a certain disability on the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. But the cause of action has no relation to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.—*Chand Koer* v. *Pratab Singh*, I. L. R. 16 Calc. 98 : L. R. 15 I. A. 156. So also in the case of a suit disposed of under section 108, Code of Civil Procedure.—*Karim Mahomed Jamal* v. *Rajuma*, I. L. R. 12 Bom. 174.

But the rejection of a plaint for default of appearance, under section 13 of Bombay Act III of 1876, was held to be a bar to a possessory suit on the same cause of action in the Civil Court under section 9 of The Specific Relief Act, I of 1877 (*Ramchandra* v. *Bhikibai*, I. L. R. 6 Bom. 477). An application under section 63 of the Administrator-General's Act, II of 1874, in respect of money or securities carried to the credit of Government, is barred by the disposal of a former similar application (*Smith* v. *The Secretary of State*, I. L. R. 3 Calc. 340).

The dismissal of a suit on the ground of misjoinder or multifariousness is not a final decision which will bar a subsequent suit : *Futteh Singh* v. *Latchmi Koer*, 21 W. R. 105 : 13 B. L. R. App. 37 : *Tilakdhari Singh* v. *Bissandro Narain Sahi*, Marsh. 418.

It would appear that a case *compromised* is not a case finally decided within the meaning of the rule so as to be a bar to subsequent litigation; but it can scarcely be said that this question is settled.—See *Laksmi Ammal* v. *Tikaram Tovaji*, 1 Mad. H. C. Rep. A. C. 240: and *Vythilinga Muppanar* v. *Vijayathammal*, I. L. R. 6 Mad. 43. In this latter case the decision of the High Court that an adoption was valid was held *res judicata* notwithstanding the compromise of an appeal preferred to the Privy Council. In *Jenkins* v. *Robertson* (L. R. 1 H. L. Sc. 117), Lord Colonsay said :—"A decree obtained by arrangement between the contending parties, the Court bestowing no judicial examination on the merits of the question, can never be *res judicata*." On the other hand, the note to the *Duchess of Kingston's* case contains the following passage :—"A decree by consent in an amicable suit seems to have an additional claim to be considered final, see *Allason* v. *Stark*, 9 A. and E. 25: *Earl of Hopetown* v. *Ramsay*, 1 Bell's Appeal C. 69." Section 375 of the Code of Civil Procedure now enacts that, if a suit be adjusted wholly or in part by *any lawful agreement or compromise*, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction. When a case was referred to arbitration. and judgment was passed in accordance with the award filed, the matter of such award was held to be *res judicata* (*Wazir Mahton* v. *Chunt Singh*, I. L. R. 7 Calc. 727: 9 C. L. R. 377).

Cases compromised.

On the other hand, there are many cases in which, though it is impossible to say literally that the matter has been heard and decided, yet the previous proceedings constitute a bar to further litigation. The dismissal of a claim, because the plaintiff has failed to produce evidence to substantiate it, has the same effect as a dismissal founded upon evidence, and the subject-matter of such claim will be *res judicata*: *Rama Rao* v. *Suriya Rao*, I. L. R. 1 Mad. 84: *Venkatachalam* v. *Mahalakshmamma*, I. L. R. 10 Mad. 272: *Sahadeo Pande* v. *Nokhid Pande*, 15 W. R. 573: *Kartik Chandra Pal* v. *Sridhar Mandal*, I. L. R. 12 Calc. 563: *Mafizudin* v. *Amudin*, 23 W. R. 58. In *Ganesh Rai* v. *Kalka Prosad* (I. L. R. 5 All. 595) the previous suit had been dismissed *in the form in which it was brought*. The same principle was held to apply where persons made parties at their own request afterwards refrained from pressing their claims (*Sheo Charan Singh* v. *Fakira Dhobi*, I. L. R. 6 Calc. 91: 7 C. L. R. 69). See also section 158 of the Code of Civil Procedure, and *Venkataramaya Apparau* v. *Anumukonda Rangaya Nayudu*, I. L. R. 7 Mad. 41.

Cases in which previous proceedings a bar, though matter not actually heard and decided.

Under the provisions of Explanation III (*ante*, p. 236) any relief claimed in the plaint, which is not expressly granted by the decree, must, for the

purpose of the section, be deemed to have been refused.[6] In *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (I. L. R. 4 Mad. 308), it was said that this explanation must be read with the section, and clearly applies to relief applied for, which the Court is bound to grant with reference to the matters directly and substantially in issue. Even if the suit as regards the relief claimed has been wrongly dismissed, the plaintiff cannot sue again for the same relief. *Sukh Lal* v. *Bhikhi*, I. L. R. 11 All. 190.

Explanation III of section 13 does not apply when the Court is silent on a head of relief only claimed as auxiliary to the main relief, and which, by implication, is rather granted than refused. It only applies when the Court is silent on an independent head of relief claimed and duly controverted: *Fatmabai* v. *Aishabai*, I. L. R. 12 Bom. 454: S.C. in appeal, I. L. R. 13 Bom. 242.

Withdrawal from suit.

If a plaintiff withdraw from the suit without the permission of the Court, he will under section 373 of the Code of Civil Procedure be precluded from bringing a fresh suit for the same matter. And section 374 enacts that, in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought. Provisions similar to the above, but not so precise, were contained in section 97 of the old Code. With respect to the power of a plaintiff to withdraw from the suit, apart from these express provisions, the following observations of their Lordships of the Privy Council are important:—"We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a *non-suit* known in those Courts. There is a proceeding in those Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit, but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit, to cases in which a material document has been rejected, because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined and the party having failed to produce the

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[6] This is in accordance with the decision of the majority of Full Bench of the Allahabad High Court in *Bhao Singh* v. *Hef Ram*, 7 N.-W. P. Rep. 17: and must be held to alter what was decided in *Balum Bhutt* v. *Bhuban Lal*, 6 W. R. 78 (Here the plaint asked for possession and *mesne* profits, but no issue was raised and no point decided as to the right to *mesne* profits; and a second suit to recover *mesne* profits was held to be maintainable): in *Pratab Chandra Barua* v. *Sarnomayi*, 4 B. L. R. F. B. 113: *Bakshiram Gangaram* v. *Darku Tukaram*, 10 Bom. H. C. Rep. 372: and *Sheoraj Nandan Singh* v. *Deo Nandan Singh*, 24 W. R. 23. A distinction must, however, be made between the above case and those cases in which the Court of first instance or of appeal has refused to determine matter raised by the pleadings. (See *ante*, pp. 238, 289.)

evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit" (*Watson* v. *The Collector of Rajshahi*, 13 Moo. I. A. 170). The "liberty to sue again," which gave occasion to the above observations, had been given before Act VIII of 1859 came into operation; but these observations are valuable as showing that, in the opinion of the highest Court of Appeal, there did not exist under the old system of procedure, and apart from the express provisions of the Code of Civil Procedure, any right to withdraw from a suit once commenced, so as to retain the privilege of suing again on the same cause of action. This ruling was followed in *Banwari Das* v. *Mahammad Mashiat*, I. L. R. 9 All. 690. In *Sukh Lal* v. *Bhikhi*, I. L. R. 11 All. 187, it has been further held that a Court when dismissing a suit has no power to give the party leave to bring a fresh suit, and that he can only give such permission under the provisions of section 373, Civil Procedure Code. See also *Kudrat* v. *Dinu*, I. L. R. 9 All. 155, and *contra*, *Ram Charan Bahurdar* v. *Reazuddin*, I. L. R. 10 Calc. 836.

Section 373 of the Civil Procedure Code does not apply to applications for execution of decrees: *Wajihan* v. *Bishwanath Persad*, I. L. R. 18 Calc. 462: *Radha Kishenlal* v. *Radha Prasad Singh*, I. L. R. 18 Calc. 515: *Banko Bihari Gangopadhya* v. *Nil Madhab Chattopadhya*, I. L. R. 18 Calc. 635: *Tara Chand Megraj* v. *Kashi Nath Trimbak*, I. L. R. 10 Bom. 62: *Shanko Bisto Nadgir* v. *Narsinghrao Ram Chandra*, I. L. R. 11 Bom. 467: *Rama Nadan* v. *Periatambi*, I. L. R. 6 Mad. 250: *Lakshmi Narasimha* v. *Atchanna*, I. L. R. 15 Mad. 240. See *contra*, *Radha Charan* v. *Man Singh*, I. L. R. 12 All. 392, and *Sher Singh* v. *Dayaram*, I. L. R. 13 All. 564.

The rulings as to the effect of *ex-parte* and unexecuted decrees in subsequent suits are conflicting. The question has been considered principally in connection with rent-suits. In an early case (*Kali Kant Rai* v. *Asrafunnisa*, 2 W. R. 326), it was ruled that in a suit for enhancement *ex-parte* summary decrees for rent are not satisfactory proof that a variation has taken place in the amount of the rent paid. Subsequently, it was said, that a defendant who omits to defend a suit and allows an *ex-parte* decree to be passed against him cannot afterwards object to the decree as no evidence (*Chandra Kumar Datta* v. *Jai Chandra Datta*, 19 W. R. 213). But in another case, it was observed that where a suit is tried *ex-parte*, and no issues of fact are raised beyond the general issue involved in the claim, the decree considered as evidence is only evidence that the amount decreed was at the time due from the plaintiff to the defendant (*Goya Prasad Aubasti* v. *Tarini Kant Lahiri*, 23 W. R. 149). Then, in a later case decided by a Full Bench, it was held that an *ex-parte* decree for rent is admissible as evidence of the rate of rent in a subsequent suit between the same parties, even though it has become inoperative from not having been executed within the period of limitation (*Bir Chandra Manik* v. *Ram Krishna Shaha*, 23 W. R. 128: 14 B. L. R. 370). This was followed in *Mahomed Kana Miah* v. *Ran Mahomed*, 24 W. R. 254, and in another case in which it was ruled that a decree obtained *ex-parte* is in

Ex-parte and unexecuted decrees.

the absence of fraud or irregularity as binding for all purposes as a decree in a contested suit. Such a decree is admissible in evidence, even though the period for executing it has expired: *Bir Chandra Manik* v. *Harish Chandra Das*, I. L. R. 3 Calc. 383: 1 C. L. R. 585. Moreover, in *Jagadamba Dasi* v. *Tarakant Banarji* (6 C. L. R. 121), their Lordships of the Privy Council held that the effect of an appeal decided by them *ex-parte* could not on that ground be disputed. But in a subsequent case it was said that a decree obtained *ex-parte* is not final within the meaning of expl. 4, sec. 13 of Act X of 1877. Such a decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property (*Nil Mani Singh* v. *Hira Lal Das*, I. L. R. 7 Calc. 23: 8 C. L. R. 257). This was followed in a suit for arrears of rent of a half share of land in which the plaintiffs relied upon an *ex-parte* decree for rent at a certain rate, which they had obtained in 1869 against the tenants of this share. It did not appear that the *ex-parte* decree had been executed. It was accordingly held that it was open to the defendants to dispute the rate of rent claimed, and that the plaintiffs were bound to prove that they were entitled to recover it. (*Bhagirath Patni* v. *Ram Lochan Deb*, I. L. R. 8 Calc. 275: 10 C. L. R. 159) In *Ram Sundar Tewari* v. *Srinath Dewasi* (10 W. R. 215. 14 B. L. R. 371): *Bishnu Prakash Singh* v. *Ratan Gir Chela* (20 W. R. 3: and *Hira Lal Sil* v. *Johir Mollah*, 20 W. R. 273, certain decrees, though not *ex-parte* ones, were held to be no evidence or worthless, because they had not been executed. And where, before the passing of Act X of 1859, a zamindar had obtained a decree entitling him to enhance the rent of a *talúk*, but had never executed it, so that the rent remained unchanged from the time of the Permanent Settlement, it was held that this decree did not prevent the *talúk* from falling under the operation of section 15 of the Act, and being secured thereby from enhancement (*Haronath Rai* v. *Gobind Chandra Dutt*, 15 B. L. R. 120) The cases of *Ram Sundari Debi* v. *Ram Prasad Sadhu*, 8 W. R. 288, and *Durga Charan Chatarji* v. *Doya Mayi Dasi*, 20 W. R. 243, are to the contrary effect. Where a decree for possession of land was never executed and became barred by limitation, it was held that a second suit could not be brought for possession of the same property unless upon a cause of action which had arisen since that decree was passed (*Narsingh Das* v. *Kamaruddin*, 20 W. R. 412).

The subject was recently considered by a Full Bench in *Madhusudan Shaha Mandal* v. *Brae*, I. L. R. 16 Calc. 300. The referring Bench in this case propounded four questions to be answered by the Full Bench, *viz.*, (1) whether an *ex-parte* decree for arrears of rent operates so as to render the question of the rate of rent *res judicata* between the parties; (2) whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved; (3) whether it so operates if the rate of rent alleged is expressly declared by the decree to be proved: and (4) whether an *ex-parte* decree operates so as to render any question decided by the decree *res judicata* in the absence of proof that such decree was executed.

Explanation IV provides that a decision is final when it is such as th Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. In *Nilvaru* v. *Nilvaru*, I.L.R. 6 Bom. 110, it seems to be held that a decision liable to appeal is final within t meaning of the section until the appeal is made—See also *Pran Nath Sandyal* v. *Ram Kumar Sandyal*, 2 C. L. R. 33. But in *Nilmani Singh* v. *Hari Lal Das* (I. L. R. 7 Calc. 23: 8 C. L. R. 257), it was said that an *ex-parte* decree is not final within the meaning of this Explanation so long as it is open to the Court, on the application of the parties, to modify it.

And in *Balkishan* v. *Lal Kishen*, I. L. R. 11 All. 148, it was ruled by *Mahmud, J.*, that a judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. An order under section 244, Code of Civil Procedure, made between parties in the course of execution-proceedings becomes final by not being appealed against: *Basudev Narain Singh* v. *Seoloji Singh*, I. L. R. 14 Calc. 640.

III. We have in the third place to consider what Court is a *Court of jurisdiction competent to try* the subsequent suit or the suit in which the issue is subsequently raised. By a Court so competent the matter must have been heard and decided in the previous suit in order to be *res judicata* in the subsequent suit. Whether a particular Court has jurisdiction in respect of a particular matter is a question which arises constantly in India, and the answer to this question is occasionally by no means obvious. Different Courts, Civil Courts, and Revenue Courts, were established for different purposes from the earliest period of our rule; and their separate jurisdictions were not always very accurately defined by the laws under which they were constituted. Some of these Courts were created for temporary purposes only, and ceased to exist as soon as they had performed the special work for which they were designed. Others have been, in the progress of time and reform, abolished or materially altered, their jurisdiction being either transferred to other tribunals or so essentially changed as to involve the creation of almost a new tribunal. Of Civil Courts in the Mufassal there are several grades, the jurisdiction of which is restricted to defined areas, and is in respect of the subject-matter of litigation regulated by pecuniary limits of value.[7] To give the merest intelligible sketch of all the Courts that have existed in India since the establishment of British rule, and of their various jurisdictions, would occupy a considerable amount of space, and would be

Court must be of competent jurisdiction, concurrent or exclusive.

[7] For example, in the Bengal Presidency the local jurisdiction of a Subordinate Judge usually extends to the whole district, and his jurisdiction in respect of value is unlimited. The jurisdiction of a Munsif is commonly confined to an area, which is a subdivision of a district; and is strictly limited to suits in which the amount or value of the subject-matter in dispute does not exceed *one thousand* rupees. For the rule where causes of action are united, see the last para. of section 45 of the Code of Civil Procedure.

inconsistent with the design of this work.[8] It must, therefore, suffice to say here that the Courts, both Revenue and Civil, in each Presidency are constituted and regulated by different Acts of the Legislature: for example, the Civil Courts in Bengal, the N.-W. Provinces and Assam, by Act XII of 1887—the Civil Courts in the Madras Presidency, by Act III of 1873—the Civil Courts in the Bombay Presidency, by Act XIV of 1869—the Civil Courts in Oudh, by Act XIII of 1879—the Civil Courts in the Punjab, by Act XVIII of 1884—the Civil Courts in the Central Provinces, by Acts XIV of 1865 and XVI of 1885—the Civil Courts in the Jhansi District, by Act XVIII of 1867—the Civil Courts in British Burma, by Act XI of 1889—the Civil Courts in the Province of Sindh, by Acts XII (Bom. C.) of 1866, III (Bom. C.) of 1868, and V of 1872—the Courts in Coorg, by Reg. II of 1881—the Courts at Aden, by Act II of 1864—the Courts in Ajmer and Merwara, by Reg. I of 1877—the Courts in British Baluchistan, by Reg. III of 1890—the Courts in the territories administered by the Agent to the Governor-General in Baluchistan by the Baluchistan Agency Civil Justice Law, 1890—the Courts of Small Causes in the Presidency Towns, by Act XV of 1882—the Courts of Small Causes outside the Presidency Towns, by Act IX of 1887—(which gives jurisdiction up to Rs. 500, which may be extended by the Local Government to Rs. 1,000, in all suits of a civil nature except such as are specified in the second schedule to the Act—Revenue Courts in the Bengal Presidency, by Acts X of 1859, XIX of 1873, VI (B.C.) of 1862, and XII of 1881 (N.-W. P. only)—Revenue Courts in the Province of Oudh, by Act XXII of 1886—Revenue Courts in the Punjab, by the Punjab Tenancy Act, XVI of 1887—Revenue Courts in the Madras Presidency, by Act VIII (M.C.) of 1865—Revenue Courts in the Central Provinces, by Act IX of 1883 &c., &c. One main feature to be found in most of these Acts is the constitution of Courts of various grades with different pecuniary limits of jurisdiction. The Revenue Courts have jurisdiction, generally speaking, in matters connected with the Government revenue (and here the jurisdiction of the regular Civil Courts is usually excluded), and with the rent of land used for agricultural purposes. The tendency of modern reform is to extend the jurisdiction of the regular Civil Courts to matters which were formerly reserved to the Revenue Courts only. For example, in Lower Bengal, Act VIII (B.C.) of 1869 and the Bengal Tenancy Act, VIII of 1885, have in those districts in which they have been put into operation, transferred to the Civil Courts the jurisdiction previously exercised by the Revenue Courts in all questions arising between the landlords and tenants of land used for agricultural or similar purposes.

We will now notice a few cases which will illustrate this branch of the subject. In *Misr Raghubar Dial* v. *Sheo Baksh Singh*, L. R. 9 I. A. 197: I. L. R. 9 Calc. 439: 12 C. L. R. 520, the facts were as follows:—A bond for

[8] A full account of these Courts in the Bengal Presidency will be found in Chapter IV of the author's *Introduction to the Bengal Regulations*.

Rs. 12,000 was executed in favour of A on the 21st November 1875, by B, who thereby agreed to pay the principal within three years, and to pay interest monthly at the rate of one rupee and eight annas per cent. per month. The interest not having been paid, A brought a suit against B, in December 1877, to recover Rs. 4,140, unpaid balance of interest. This suit was instituted in the Court of an Assistant Commissioner, whose jurisdiction was limited to suits in which the amount or value of the subject-matter did not exceed Rs. 5,000. B pleaded in this suit that he had not received the full sum of Rs. 12,000, the consideration stated in the bond. The Assistant Commissioner at first held that he had no jurisdiction to try the question thus raised, as it involved an amount exceeding Rs. 5,000; but on appeal, his order, dismissing the suit, was cancelled, and it was remanded for trial on the merits upon the ground that the amount actually sought to be recovered was within his jurisdiction. The case was then tried, and it was found that the principal sum due on the bond was Rs. 4,790, and that the plaintiff was entitled to interest thereon; and as the plaintiff had admitted the receipt of Rs. 2,475 on account of interest, which exceeded the sum found due as interest by Rs. 822, the suit was dismissed. A then instituted a second suit on the 7th December 1878, in the Court of the Deputy Commissioner, who had jurisdiction in suits of any value. In this suit he sought to recover the principal sum of Rs. 12,000, together with Rs. 2,435 interest on that amount from the 21st October 1877 to the 7th December 1878. B pleaded want of consideration, and that, in a previous suit for interest on the same bond, the issue regarding consideration had been determined in his favour, the Court deciding that he had received only Rs. 4,790 and not Rs. 12,000. Upon this a preliminary issue was framed as to whether the question of consideration was *res judicata*. The Deputy Commissioner decided this issue in favour of B, and gave judgment for the balance found to be due of the principal sum of Rs. 4,790 and the interest thereon. The plaintiff appealed to the Judicial Commissioner of Oudh, who dismissed his appeal. He then preferred a further appeal to the Privy Council, who said in their judgment upon this appeal :—"The question now before their Lordships depends upon the construction of section 13 of Act X of 1877. Before considering that question, it will be well to refer to the state of the law in India when that Act was passed. Section 2 of Act VIII of 1859, the Code of Civil Procedure for which Act X of 1877 was substituted, provided that the Civil Courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim. It is clear that this section would not have applied to the present case, the causes of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought, the cause of action in the second had not arisen. But independently of this provision in The Code of Procedure, the Courts in India have adopted the rule laid down in the *Duchess of Kingston's* case, and have applied it in a great number of

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cases. It was recognized as the law in India by this Board in *Khagauli Singh* v. *Hossein Bux Khan*,[9] where, after quoting the passage in the *Duchess of Kingston's* case in which the rule is stated, their Lordships say :—"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil Law, and it is perfectly consistent with the second section of the Code of Procedure, under which this case was tried. *Mussamat Edan* v. *Mussamat Bechan*[1] may be referred to as the leading case on this subject. In that case the Chief Justice, Sir Barnes Peacock, held that the two Courts must be Courts of concurrent jurisdiction, and 'in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive.' As to what is a Court of concurrent jurisdiction, it is material to notice that there is in India a great number of Courts, that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction, and that by the Code of Procedure a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in Bengal, by the Bengal Civil Courts Act, VI of 1871, the jurisdiction of a Munsif extends only to original suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000. The qualifications of a Munsif and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will or of an adoption in a suit for a small portion of the property affected by it should be conclusive in a suit before a District Judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the Munsif's decision, but that upon the facts would be to the District Court and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case. It appears to their Lordships that if this case had arisen before the passing of Act X of 1877, the High Courts in India would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond." Having quoted section 13 as it stood in the Code, Act X of 1877, their Lordships continued :—"The intention seems to have been to

[9] See *ante*, pp. 236, 248.

[1] See *ante*, p. 260.

embody in the Code of Procedu , by sections 12 and 13, the law then in force in India instead of the imperfect provision in section 2 of Act VIII of 1859. And, as the words of the section do not clearly show an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration. The first suit was for Rs. 1,665, for interest only, the principal not being then due, and the matter in issue was whether that sum was due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and thus an issue was raised as to the consideration for the bond; but this was *a collateral rather than a direct issue* in the suit. The plaintiff might have succeeded without having a finding upon it, if he had proved an admission by the defendant that the sum claimed was due for interest, or had shewn that the Rs. 2,475 had been expressly paid on account of the larger sum which he said the defendant owed for interest. If the decision of the Assistant Commissioner is conclusive, he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by *Court of competent jurisdiction* Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit[2] in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction. In the judgment delivered by this Board in *Khayauli Singh* v. *Hossein Bux Khan*, it said that the *eadem causa petendi* and judgment of a Court of competent or concurrent jurisdiction were both wanting in that case. This seems to show what was considered to be a competent Court. Their Lordships think that section 13 of Act X of 1877 should be so construed." See also *Sheoraj Rai* v. *Kashi Nath*, I. L. R. 7 All. 247.

The case of *Ran Bahadur Singh* v. *Lacho Koer*, I. L. R. 11 Calc. 301 · L. R. 12 I. A. 23, also decided by the Privy Council, is to the same effect. In this suit Ran Bahadur Singh sued Lacho Koer, the widow of his deceased brother, Murlidhar Singh, to recover possession of the property held by Murlidhar on the ground that he and his brother were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and that she was therefore entitled to a widow's estate in the property, and that the question had been conclusively determined in her favour in a former suit between her and the plaintiff. It appeared that she had previously brought a suit against a tenant for the recovery of rent, in which suit Ran Bahadur had intervened, asserting the same title as he set up in the suit he subsequently brought for possession of the property. An issue was framed on the point, and was decided in favour of the widow Lacho Koer. It was held by their Lordships of the Privy Council [on the authority of *Surjamani Day* v. *Sadanand Mahapatro*, 12 B. L. R. 304: *Krishna Bihari Rai* v. *Brojeshari Chaudhurain*, L. R. 2 I. A. 283: I. L. R. 1 Calc. 144: *Edan v. Bechan*

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[2] This construction has been adopted in the section as it stands in the present Code, Act XIV of 1882.

8 W. R. F. B. 175, and *Misr Raghubar Dial Singh* v. *Sheo Baksh Singh*, L. R. 9 I. A. 197 : I. L. R. 9 Calc. 439] that the question of title was not *res judicata*, as the Munsif who had decided the suit for rent was not competent to decide the subsequent suit for the recovery of possession of the property, and, further, that having regard to the subject-matter of the suit, and to the form of the issue, the question of title was in the rent-suit no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and that on this ground also the judgment in the rent-suit was not conclusive. See also *Ganapati* v. *Chathu*, I. L. R. 12 Mad. 223 : but this case was distinguished from in *Vengataraghava* v. *Rangamma*, I. L. R. 15 Mad. 498, in which, though the value of the property involved exceeded Rs. 2,500, yet as both suits had been brought in the Court of the District Munsif, the question of the validity of an adoption decided in the previous case was held to be *res judicata* in the subsequent suit. In *Bholabhai* v. *Adesang*, I. L. R. 9 Bom. 75, the plaintiff sued the defendant for Rs. 119, which he alleged had been unlawfully exacted from him as enhanced rent of certain land in his occupation. He claimed to be owner of the land subject to a quit-rent payable to the defendants. The defendants denied his ownership, and asserted their right to levy the enhanced rent. The lower Court found in favour of the defendants and dismissed the plaintiff's claim. The plaintiff appealed, but his appeal was dismissed. He then appealed to the High Court, but it was held that no second appeal lay, as the claim was for less than Rs. 500, and was within the cognizance of a Court of Small Causes. The plaintiff then sued for the sum of Rs. 689 on the same allegations. The District Judge dismissed the suit, holding it to be *res judicata*. The Bombay High Court, however, held that the suit was not so barred. "It was true," it is said, "that the Court which tried the first suit was competent to deal with the subsequent suit, but in the subsequent suit it could not give a final unappealable decision. Though the Court was the same physically, yet it had not on the two occasions an identical jurisdiction. Moreover, for the purpose of establishing a prior decision as *res judicata*, we must look to the whole series of possible proceedings up to the highest tribunal; otherwise, the anomaly must arise of the highest Court in an important case being bound by a prior decision in a case too paltry for appeal. Section 13 of the Code of Civil Procedure cannot be applied quite literally; if it could, then the Court trying a second suit would be bound by the decision of a point in the first suit treated by the Court in appeal as irrelevant for that case, though not formally set aside. We must construe the section, if possible, so as to avoid an anomalous result, and this end is attained by saying that the words 'competent to try such subsequent suit' in the section mean 'competent to try the suit or issue on account of its nature with conclusive effect,' since otherwise the higher jurisdiction provided by the Code would be excluded by the lower."

In connection with this subject we may consider the judgment of the Full Bench in *Hari Sankar Mukharji* v. *Muktaram Patro* (15 B. L. R.

240 : 24 W. R. 154), which was decided while the old Code of 1859 was in force. Here the suit was instituted in the Civil Court under Act VIII (B. C.) of 1869 to recover rent at an enhanced rate after notice. The defendant pleaded that a portion of the land, for which rent was claimed, was *lakhiraj*, or rent-free. In a previous suit brought in the Revenue Court under the provisions of Act X of 1859, it had been decided that this land was not *lakhiraj*, and that the plaintiff was entitled to assess rent thereupon. This decision was pleaded as concluding the parties upon the point; but it was held that it was not conclusive, and that the matter was not *res judicata*. It was observed, in referring the case to a Full Bench, that the result of all the decisions after much conflict is, that questions of title cannot be determined finally by a suit instituted in the Revenue Courts; and the majority of the Full Bench accordingly held that the Revenue Court, not being competent to decide the question finally,[3] was not a Court of concurrent jurisdiction with the Civil Court, and that therefore its judgment did not render the matter *res judicata*.[4] In the judgment of the majority it was said: "It is only with regard to matters decided in suits under Act X of 1859 that the question, which is the subject of this reference, can arise; for under Bengal Act VIII of 1869 the decision of the Civil Court in a suit for rent, as in any other kind of suit, will no doubt be conclusive in a subsequent suit between the same parties.[5] As to the effect of the decision of questions of title by a Revenue Court, see also *Shambhu Narain Singh* v. *Bachcha*, I. L. R. 2 All. 200: *Husain Shah* v. *Gopal Lal*, I. L. R. 2 All. 428: *Debi Prasad* v. *Jafar Ali*, I. L. R. 3 All. 40: *Gopal* v. *Umadal*, I. L. R. 3 All. 51: *Muhammad Abu Jafar* v. *Wali Muhammad*, I. L. R. 3 All. 81: *Raj Bahadur* v. *Birmha Singh*, I. L. R. 3 All. 83: *Khalik Misr* v. *Karim Chaudhri*, I. L. R. 3 All. 521: *Radha Prasad Singh* v. *Sadik Rai*, I. L. R. 5 All. 245: *Tota Ram* v. *Harkishan*, I. L. R. 7 All. 224: *Harika Ramayyar* v. *Sri Vidya Sri Sindu Tirtasami*, I. L. R. 7 Mad. 61: *Muttu Kumarappa Reddi* v. *Arumuga Pillai*, I. L. R. 7 Mad. 345: *Ganga Prasad* v. *Baldeo Ram*, I. L. R. 10 All. 347. Under the text of section 13 of the present Code, the determination of the question depends on the competency of the Court which tried the first suit, to try the second suit. Thus, in *Pathuma*[2] v. *Salimamma*, I. L. R. 8 Mad. 83,

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[4] The report of this case does not show whether the alleged *lakhiraj* was created before or after 1790. If created after 1790, it might be argued that the Revenue (Collector's?) Court had concurrent jurisdiction—see the Author's edition of the Bengal Regulations, pp. 249—255.

[5] The majority also expressed an opinion that the judgment, though not conclusive on the principle of *res judicata*, was clearly admissible as evidence (sections 11 and 13 of the Evidence Act), and the Civil Court was bound to give weight to the decision of the Revenue Court—but see *ante*, pp. 100-105.

[1] The above remark is expressed too widely, or at least does not accurately state the law according to section 13, Act XIV of 1882. The decision of the Civil Court upon a *collateral* point in a suit brought under Act VIII (B. C.) of 1869 will not be conclusive in a subsequent suit, (see *ante*, pp. 263, 264, and also *Gobind Chandra Kundu* v. *Tarak Chandra Basu*, I. L. R. 3 Calc. 145, I. L. R. 35), and whether a matter is *res judicata* or not depends, under Act XIV of 1882, on whether the Court trying the first suit was competent in respect of jurisdiction to try the second in which the matter is in issue raised.

the plaintiff, Pathuma, had previously sued to eject a tenant from a house and to recover arrears of rent. One Salimamma intervened, and was made a defendant, and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the pecuniary jurisdiction of the Munsif, in whose Court the suit had been brought. The suit was at first dismissed, but in appeal the claim of Salimamma under the deed of gift was adjudicated on and rejected. Subsequently, Salimamma sued Pathuma to recover the property covered by the deed of gift. It was held that Salimamma was estopped by the decree in the former suit from claiming the house which was within the pecuniary jurisdiction of the Munsif, but she was not estopped from showing that the deed of gift was valid, as the decree in the former suit was not the decree of a Court competent to decide it; it is the powers of the Court in which the suit is instituted, it was said, and not those of the Court in which the suit is decided on appeal, which must be looked to. See also *Tapanidhi Dhir; Gir Gosain* v. *Sripati Sahani*, I. L. R. 5 Calc. 832. This latter view would seem inconsistent with the ruling of *West, J.*, in *Bholabai* v. *Adesang*, I. L. R. 9 Bom. 75, *ante*, p. 303.

Distinction between the jurisdiction of the Civil and Revenue Courts.

The distinction between the jurisdiction of the Civil Courts and of the Revenue Courts is no doubt one of the most important portions of the present subject. The exact limits of these jurisdictions differ in each Presidency; and indeed have differed in the same Presidency and even in smaller territorial divisions according to different views of policy which have from time to time prevailed. Any detailed account of these changes would be out of place in the present work. It would therefore seem unnecessary to pursue the subject further.

Competency of special Courts.

The decision of the Civil Court settling and apportioning the compensation for land taken for public purposes under the provisions of Act X of 1870 is the final decision of a competent Court (*Nilmani Singh* v. *Ram Bandhú Rai*, L. R. 8 I. A. 90: I. L. R. 7 Calc. 388). But the competence of the Civil Court to decide questions of title is apparently limited to persons who claim a share in the amount of compensation (*Nobodip Chandra Chaudhri* v. *Brajendro Lall Rai*, I. L. R. 7 Calc. 406: 9 C. L. R. 117). The proceedings of a Registration Officer making an inquiry whether a document has been executed, under the power conferred by section 74 of Act III of 1877, are not the proceedings of a competent Court, nor will his finding upon the question of execution bar a suit to have a document, which has been admitted to registration, declared to be a forgery (*Makima Chandra Dhar* v. *Jugal Kishor Bhattacharjya*, I. L. R. 7 Calc. 736). But the certificate of registration endorsed on a document is ordinarily conclusive as to its having been duly registered (*Ikbal Begam* v. *Sham Sundar*, I. L. R. 4 All. 384: *Mathura Das* v. *Mitchell*, I. L. R. 4 All. 206). A Court of Small Causes in the Mufassal may try a question of title to immoveable property arising incidentally in a case in which it

has jurisdiction, but its decision on this question will not have the effect of an estoppel in any subsequent suit (*Manappa Mudali* v. *McCarthy*, I. L. R. 3 Mad. 192).

In *Gopi Nath Chobe* v. *Bhagwat Prasad*, I. L. R. 10 Calc. 697, it has been said that the words "in a Court of jurisdiction competent to try such subsequent suit" refer to the jurisdiction of the Court at the time when the first suit was brought, and if the Court which tried the first suit was competent to try the subsequent suit, if then brought, the decision of such Court would be conclusive, although on a subsequent date by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to the property. This rule was followed in *Raghunath Panjah* v. *Issar Chandra Chaudhri*, I. L. R. 11 Calc. 153.

Rise in value of subject matter.

It is a rule in England that nothing shall be intended to be out of the jurisdiction of a *superior* Court, but that which specially appears to be so, and that nothing is intended to be within the jurisdiction of an *inferior* Court, but that which is expressly alleged. Where, therefore, it appears upon the face of the proceedings that an inferior Court has jurisdiction, it will be presumed that the proceedings are regular; but if it do not so appear, if it appear affirmatively that the inferior Court has no jurisdiction, or, if it be left in doubt whether it has jurisdiction or not, no such presumption will be made. It is necessary, therefore, for a party, who relies upon the decision of an inferior tribunal, to be prepared to show that the proceedings were within its jurisdiction.[6] This rule as to jurisdiction has been quoted and followed in India (see *Queen* v. *Nabadwip Goswami*, per *Peacock, C. J.*, 1 B. L. R. O. Cr. 30). The High Courts and the Courts occupying a similar position in the Punjab and British Burma are probably the only Courts which can in India be regarded as superior Courts within the rule.

Presumption as to jurisdiction.

The consent of parties will not give to a Court a jurisdiction which it does not otherwise possess (*Kadambini Dasi* v. *Durga Charan Dutt*, Marsh. Rep. 4 : *The Government of Bombay* v. *Raumal Singji Amar Singji*, 9 Bom. H. C. Rep. 242 : *Bhupendranath Chaudhri* v. *Kali Prasanno Ghosh*, 24 W. R. 205. *Queen* v. *Bholanath Sen*, I. L. R. 2 Calc. 24). But in a suit brought in the Court of a Subordinate Judge the defendant successfully pleaded that the subject-matter was

Consent of parties.

[6] See *Peacock* v. *Bell*, 1 Saunder's Rep. by Williams 74 : *Gosset* v. *Howard*, 10 Adolphus and Ellis, Queen's Bench Rep. 45 : *Kinning* v. *Buchanan* 8 Common Bench Rep. 286 : *Dempster* v. *Purnell*, 4 Scott's New Rep. 39 : and *Stanton* v. *Styles*, 5 Welsby, Hurtstone, and Gordon's Rep. 583. The jurisdiction of an inferior Court, if it do not plainly appear, may be inferred by fair and necessary intendment (*In the matter of the Commissioners for the Town of Calcutta*, 1 Boul. Rep. 565). As to a Court in British territory and governed by the Code of Civil Procedure refusing to execute the decree of a Court governed by the same Code on the ground that such latter Court had no jurisdiction to make the decree, see *Chogalal* v. *Trueman*, I. L. R. 7 Bom. 481.

overvalued. The plaintiff thereupon re-instituted the suit in the Court of a Munsif and obtained a decree. The defendant appealed, and in appeal contended that the value of the subject-matter was over Rs. 1,000, and therefore beyond the Munsif's jurisdiction and within that of the Subordinate Judge. It was held that he was barred from making this contention by his former pleading and the former judgment (*Brahmamoi Dasi* v. *Anand Chandra Chatarji*, 22 W. R. 120). A sued B in the French Court at Mahé. B made no objection to the jurisdiction and defended the suit. A, having obtained a decree, sued B thereupon in a Court in British territory. B pleaded that the Court at Mahé had no jurisdiction to make the decree: but it was decided that, having taken the chance of a judgment in his favour at Mahe, he could not be allowed to set up this plea (*Kandoth Mammi* v. *Nilancherayil Abdu Kalandan*, 8 Mad. H. C. Rep. 14).

The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it; and does not depend upon what the defendant may assert by way of defence. It may turn out at the trial that the subject of contest between the plaintiff and the defendant is not properly represented by the form in which the plaintiff has chosen to put his claim; but the occurrence of that contingency will only render the plaintiff's suit liable to be dismissed as not proved. It will not affect the jurisdiction under which the suit, as brought by the plaintiff, fell (*Chandra Kumar Mandal* v. *Bakir Ali Khan*, 9 W. R. 398).

Jurisdiction of Court depends on nature of claim.

IV. We have in the fourth place to consider in what cases the former suit must be held to have been *between the same parties or between parties under whom they or any of them claim, litigating under the same title.* The general rule is contained in the maxim—*res inter alios acta alteri nocere non debet, i.e.*, a matter transacted between one set of persons ought not to injure or affect another person. But it is reasonable that the same set of persons or persons claiming under them should be bound by previous proceedings concerning the same matter. "The verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he *or those under whom he claims*, were not at liberty to controvert."[1] See also *Niazullah Khan* v. *Nazir Begam*, I. L. R. 15 All. 108. There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*,[2] and no man can, except in certain cases excepted by the Statute

Judgment conclusive only between same parties or their privies.

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[1] Buller's *Nisi Prius*, 233.

[2] "He who feels the advantage ought also to feel the burden."

Law and the law merchant, transfer to another a better right than he himself possesses.[9] If a person can show that he, being at the time a minor, was not properly represented in the suit, that he was not duly served with process, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly, the final decree will not bind him as a party (*Partab Narain Singh* v. *Subhao Koer*, L. R. 5 I. A. 176): but if he was properly represented in the former suit, the decision in it will bind him: *Kamaraju* v. *Secretary of State for India*, I. L. R. 11 Mad. 309. *Suresh Chandra Wum Chaudhri* v. *Jagat Chandra Deb*, I. L. R. 14 Calc. 204. *Hari Saran Moitro* v. *Bhubaneshari Debi*, I. L. R. 16 Calc. 40. In the case of *Ram Tanu Acharjya* v. *Kamal Lochan Rai* (3 B. L. R. App. 37 : 11 W. R. 407) a landlord sued his tenant and the tenant's surety in the Revenue Court for rent, the surety being made a nominal party merely, and the decree being passed against the tenant alone. He afterwards sued the surety in the Civil Court on the surety-bond which had been executed by him. It was decided that this second suit was not barred by the decree of the Revenue Court. It was observed that in that Court "no issue was raised as to the surety's liability, and no decree was pronounced against him." The plaintiff was, however, held not entitled to recover the *costs* of the suit in the Revenue Court. Here the Revenue Court had properly no jurisdiction to try the liability of the surety, but he would probably have been bound by the decree as to the fact of the rent having been due by his principal at the time of the institution of the suit. As to a person, who is not a necessary party, being bound by the decree, if he allow his name to remain upon the record and do not apply to be dismissed from the suit, see *Collier* v. *Walters*, L. R. 17 Eq. 252. The principle of *res judicata* has no application where both the parties to the second suit claim under the same party to the first suit (*Vythilinga Muppanar* v. *Vijayathammal*, I. L. R. 6 Mad. 43).

Cases in which parties to second suit were held not to claim under parties to first suit.

A decision for or against a man in one capacity, as for example, in a representative character, will not have the force of a *res judicata* for or against him when suing or sued in a wholly distinct capacity, and in fact as a different person in law. A Hindú female, who had succeeded to her father's estate, transferred it to her grand-daughter by a deed in the nature of a release, reserving maintenance and other advantages to the donor. Subsequently, having quarrelled with the grand-daughter, she brought a suit to set aside this deed on the ground of non-performance of the conditions. While the case was pending in appeal, the plaintiff died and the *reversioners* were admitted to conduct the appeal in her stead. The grand-daughter subsequently died, and one of these reversioners then sued to recover the property as heir to the alienor's father. It was held that he was not estopped by the judgment in the previous case, for that the reversioners merely represented in that suit the interest of

[9] 2 Smith's Leading Cases, 789.

their predecessor, the life-tenant (*Raj Kunwar* v. *Inderjit Kunwar*, 5 B. L. R. 586: 13 W. R. 52. See to the same effect, *The Zamindar of Pittapuram* v. *The Proprietors of the Mutta of Kolanka*, L. R. 5 I. A. 206: I. L. R. 2 Mad. 23: 3 C. L. R. 265). So, a suit by a reversioner (who was the heir presumptive after the widow in possession) to set aside a sale of the widow's life-estate was held to be no bar to a suit by the same person after her death to establish his rights as reversioner (*Dúrga Charan* v. *Kasi Chandra Maitri*, Marsh. Rep. 539). A, alleging himself to be the tenant of zamindar X, sued B for declaration of title and confirmation of possession. B alleging that he held under a *hawaladari* lease from zamindar Y, pleaded limitation and also denied A's possession. X had previously obtained a decree against Y, and had been put in possession under this decree within twelve years before the institution of A's suit. It was held that B could not be affected by the decree in X's suit against Y, to which he was no party, so as to prevent him from raising the question of limitation; but that, if it could be shown that X, and A through him, was in possession within twelve years, the plea of limitation would be rebutted (*Probhat Chandra Bhattacharjya* v. *Tarak Chandra Chakravartti*, 20 W. R. 227). A tenant of A sued B for possession of certain land, and his suit was dismissed. A's successor in title after A's death sued B for possession of the same land, and it was held that he was not estopped by the previous suit, as a lessor cannot be held to claim under his own lessee within the meaning of section 13 of the Code of Civil Procedure: *Rambrahmo Chakravartti* v. *Bansi Karmokar*, 11 C. L. R. 122: *Brajo Bihari Mitra* v. *Kedar Nath Mazumdar*, I. L. R. 12 Calc. 580. A, a Hindú, subject to the Mitakshara law, made a gift of a certain *mauza* to his wife B, and died without issue, leaving B surviving him. C and D, his brothers, then sued B for A's immoveable estate on the ground that it was ancestral property, but their suit was dismissed on the ground that this estate was A's separate property, to which his widow was entitled to succeed by inheritance, it being also held that B took a life-interest in the *mauza* given her by her husband. After the death of C and D, B made a gift of the *mauza* to her agent, whereupon E, the son of C, sued as heir to his uncle A, to set aside this gift as invalid. It was held that, since E, suing as heir to his uncle A, did not claim through his father C, he was not bound by the decision in the former suit as to the interest taken by B under the gift from A (*Rudr Narain Singh* v. *Rup Kuar*, I. L. R. 1 All. 734).

A claim to a house attached in execution of a decree was dismissed. The claimant then sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree against the same judgment-debtor, and that the present plaintiff had then preferred a claim to it, which was allowed. The then decree-holder sued to have the order allowing the claim set aside, but his suit was dismissed. It was held that the question of the ownership of the house was not *res judicata*, as the present decree-holder, whom the plaintiff now sued, was different from the former decree-holder and was no party to the previous suit: *Gnanambal* v. *Parvathi*, I. L. R. 15 Mad. 477. A suit for possession

of immoveable property with mesne profits brought against A and her father, and subsequently revived against A as her father's representative, was decreed against A in her representative capacity and dismissed as against her in her individual capacity. The decree-holder, in order to realize the mesne profits, attached and sold A's own private property notwithstanding her objections. In a suit by A for cancellation of this sale and for confirmation of possession of this her private property, it was held that A was not, in her individual capacity, a party to the suit in which execution had issued, and that she was entitled to maintain this action (*Wahid Ali* v. *Junayi*, 2 B. L. R. F. B. 74). The decree in this case was affirmed by the Privy Council on appeal (11 B. L. R. 149; 18 W. R. 185); but their Lordships were clearly of opinion that a party in a representative capacity would be a party to the suit within the meaning of section 11 of Act XXIII of 1861 (section 244, Act X of 1877), so that, under certain conditions, his own private property might be attached and sold, although to fix him with this liability it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. See also *Haris Chandra Gupta Shashi Mala Gupta*, 6 B. L. R. 721; *Amiratunissa Khatun* v. *Mir Mahomed Hossein Chaudhri*, 20 W. R. 280; and *Kanai Lal Singh* v. *Shoshi Bhusan Biswas*, 8 C. L. R. 117. As to whether a plaintiff can show that the defendant on the record was really acting *benami* for him, and as to how far a decree is conclusive not only as to the rights of the parties, but as to the *character* in which they sue, see *Bhawabal Singh* v. *Rajendra Pratab Sahi*, 5 B. L. R. 321. See also *Khubchand* v. *Narain Singh* (I. L. R. 3 All. 812); *Gopi Nath Chobe* v. *Bhagwat Prasad*, I. L. R. 10 Calc. 697; and *Shanqar* v. *Krishnan*, I. L. R. 15 Mad. 267, where the persons really interested were held to be bound by decisions in suits brought by them in the names of their *benamidars*. But a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his own father. He does not claim under his father within the meaning of section 13 of the Civil Procedure Code: *Ram Narain* v. *Bisheshar Prasad*, I. L. R. 10 All. 411. A mortgagee, too, does not claim under his mortgagor. After a mortgage has been duly created, the mortgagor in whom the equity of redemption is vested no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive as against, such mortgagee. The words "under whom they or any of them claim" in section 13 should be interpreted as if they were followed by the words "by a title arising subsequently to the commencement of the former suit:" *Per Mahmud, J.*, in *Sitaram* v. *Amir Begam*, I. L. R. 8 All. 324.

In *Rama Rao* v. *Suriya Rao* (I. L. R. 1 Mad. 84) A and B were the sons, and C, the widow, of the deceased *zamindar* of Pittapuram. A succeeded his father as *zamindar*, and dying, was succeeded by his son D, who, in 1862, brought a suit against B and C, for the purpose, *inter alia*, of

impeaching the acts of the widow C, of restraining her from making illegal transfers, and obtaining the cancellation of two documents of transfer made and registered by her. D brought this suit relying on his right as reversioner to the property. As to a portion of the property, the question was raised whether it formed part of the ancient *zamindari* and was merely assigned to the widow for her maintenance. No evidence was offered upon this question by either side, and it was therefore decided against D. After C's death, D sued the sons of B to recover this same portion of the property, alleging that it formed part of the ancient *zamindari*. It was held that D was estopped by the former judgment; that, although he sued in the first suit as reversioner, the widow's estate being then in existence, while in the second suit he claimed as immediate heir on the termination of the life-estate, yet the same title was the basis of the claims in both suits. In another case, A sued B in 1870 to redeem a mortgage, but his suit was dismissed on the ground that his equity of redemption had been sold in execution to C, this plea having been raised by B. A having re-purchased the equity of redemption from C brought a second suit to redeem against B, who pleaded that some of the lands only were included in the sale to C, and contended that this question was not *res judicata*, as A was not in the second suit litigating under the same title as in the first suit. It was held that the question was concluded by the first suit (*Ali Moidin Baruthan* v. *Elayachanidathil Kombi Achen*, I. L. R. 5 Mad. 239). Members of a joint Hindú family are bound by a decree given against the manager of the family which they assisted him in defending: *Narain Gop Habbu* v. *Pandarang Ganu*, I. L. R. 5 Bom. 685.

Cases in which parties to second suit were held to litigate under same title, or claim under parties to first suit.

Section 437 of the Code of Civil Procedure enacts that in all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the person so interested; and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it think fit, order them, or any of them, to be made such parties. In such cases the persons beneficially interested will be bound by a decree for or against the trustee, executor or administrator. Section 438 provides that when there are several executors or administrators, they shall all be made parties to a suit against one or more of them; provided that executors who have not proved their testator's will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties. Section 179 of The Indian Succession Act, X of 1865, enacts that the executor or administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Section 187 of the same Act enacts that no right as executor or legatee can be established in any Court of Justice unless a competent Court has granted probate or letters of administration: and section 190 enacts that no right

Trustees, executors, and administrators.

Treasury. In execution of a decree obtained against A and B jointly, their share in these sale proceeds in deposit was sold and purchased by K, who brought a suit against A and B as principal defendants, making C, D and E *pro formâ* defendants, to have it declared that he was entitled to draw the share (of the money in deposit) which he had purchased. K obtained a decree without any qualification as to the rights of C, D, and E in the share, which he had claimed as belonging to A and B. C subsequently sued K to establish a mortgage over the whole estate and a lien in respect thereof upon the very sale-proceeds for which K had obtained a decree. It was held that C was estopped by the decree in the first suit. It was observed that, if C's claim were well-founded, it would have constituted a good defence to the action brought by K against C and others; and that it was C's own fault, if he did not set up that defence at that time. It may be added that the interests of C and K were clearly opposed in the first suit, and that C could have appealed against the decree passed therein. See also *Mahomed Aminudin Khan* v. *Muzaffar Hossein Khan*, 5 B. L. R. P. C. 570: *Bissorup Gosami* v. *Gorachand Gosami*, I. L. R. 9 Calc. 120 (defendants on the record, but really supporting plaintiff's case): and *Shadal Khan* v. *Aminula Khan*, I. L. R. 4 All. 92 (similar): *Jumna Singh* v. *Kamarunissa*, I. L. R. 3 All. 152: *Bhagwant Singh* v. *Tej Kuar*, I. L. R. 8 All. 91. In *Venkayya* v. *Narasamma*, I. L. R. 11 Mad. 204, one Bapanamma sued to recover certain property on the ground that it had been orally devised to her by her deceased father Narasayya. She made one Lakshmi Narasamma, another daughter, and Venkayya, a nephew of the deceased, parties defendant. Venkayya denied the will, and pleaded that the property was ancestral and had vested in him by survivorship. Lakshmi set up title to the property under a written will and denied the title both of Bapanamma and Venkayya. The question whether Venkayya was divided from Narasayya or not was tried. It was found that the will in writing set up by Lakshmi Narasamma was valid; that Venkayya was divided from Narasayya, and that Bapanamma's title was not proved. In a subsequent suit by Lakshmi Narasamma against Venkayya to recover certain land granted to her by the will executed by Narasayya, it was held that the question whether Venkayya was divided from Narasayya or not was *res judicata*, although in the former suit Venkayya and Lakshmi Narasamma were both defendants: see also *Madhavi* v. *Kelu*, I. L. R. 15 Mad. 264.

As to purchasers of estates sold for arrears of Government revenue not claiming under the previous defaulting proprietor, and as to whether purchasers at execution sales are the representatives in interest of the judgment-debtors, see *ante*, pp. 131, 132 and 133.

Explanation V provides that where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating. With this provision may be read section 30 of the Code, which is as

Where one or more are allowed to sue or defend on behalf of several, all are bound.

follows: "Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit on behalf of all parties so interested. But the Court shall, in such case, give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service, or (if from the number of parties or any other cause such service is not reasonably practicable) by direct advertisement, as the Court in each case may direct." The explanation would not make a judgment obtained in a suit against one co-sharer binding on another co-sharer, not a party to such suit, in respect of the rights enjoyed in common by such co-sharers in their common property (*Hazir Ghazi* v. *Sonamani Dasi*, I. L. R. 6 Calc. 31, 6 C. L. R. 516: *Kunnathurillath Vasudevan Nambudri* v. *Narayanan Nambudri*, I. L. R. 6 Mad. 121: nor a judgment obtained against the father and brother of the defendant, who was a member of a joint Hindú family: *Narain* v. *Bisheshar Prasad*, I. L. R. 10 All. 411. The explanation applies to an easement or other right claimed by a number of persons under a common title or custom: it does not apply to a prescriptive right claimed by an individual in respect of his own house and premises (*Kalishankar Das* v. *Gopal Chandra Dutt*, I. L. R. 6 Calc. 49: 6 C. L. R. 543: *Thanakoti* v. *Muniappa*, I. L. R. 8 Mad. 496. As to whether a decree against the *karnavan* of a Malabar tarwad is binding on the junior members of the family, who were not parties to the suit, see *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*, I. L. R. 2 Mad. 328: *Komli* v. *Lakshmi*, I. L. R. 5 Mad. 201: *Kunnathurillath Vasudevan Nambudri* v. *Narayanan Nambudri*, I. L. R. 6 Mad. 121: *Sridevi* v. *Kelu Eradi*, I. L. R. 10 Mad. 79: and *Chandu* v. *Kunhamed*, I. L. R. 14 Mad. 324.

Foreign judgments.

Explanation VI provides that where a foreign judgment is relied on the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction. A "foreign judgment" is defined by section 2 of the Code to mean the judgment of "a foreign Court"; and a "foreign Court" is defined to mean a Court situate beyond the limits of British India and not having authority in British India, nor established by the Governor-General in Council. In the case of *Nallalambi-Mudaliar* v. *Ponnusami Pillai* (I. L. R. 2 Mad. 400), it was held that a defendant who, when sued in a foreign tribunal, makes no objection to the jurisdiction, but takes the chance of obtaining a judgment in his favour, which will relieve him from all liability, cannot afterwards question the jurisdiction, being equitably estopped, inasmuch as he led the plaintiff to believe that he allowed the proceedings to be effectual, and encouraged him to proceed in them instead of withdrawing from them and instituting proceedings elsewhere. It was further held that mere irregularity of procedure on the part of the foreign tribunal, if it ordinarily proceeded in accordance with recognized principles of judicial investigation, was not a sufficient ground for refusing to give effect to its judgment: also

that where limitation merely bars the remedy but does not extinguish the right, the judgment of the foreign tribunal is not open to the objection that the suit (on a contract) was barred by the Law of Limitation having operation in the country where the contract was made. With this case may be compared *Parry & Co.* v. *Appasami Pillai* (I. L. R. 2 Mad. 407), where the person sued before the foreign tribunal protested against the jurisdiction of that tribunal, but defended the suit in order to escape the inconvenience of being made liable to arrest and attachment of property in a foreign country. Here it was held that the judgment of the foreign tribunal did not constitute a valid cause of action in a Court of British India, as there was no voluntary submission to the jurisdiction; and this, though the person so sued, when appealing from the adverse decision of the foreign Court of first instance to a foreign appellate tribunal, did not repeat his objection to the jurisdiction. A obtained a decree against B and C in Ceylon, and having realized a portion of the decreed amount by sale of property in Ceylon, brought a suit for the balance upon the foreign judgment against B, C, D, E, F, and G, alleging that they were all members of one firm. It was held that he could not sue D, E, F, and G, upon the foreign judgment; and, if his intention was to sue them on the original cause of action, and B and C on the foreign judgment, the suit was bad for misjoinder (*Lakshmanan Chetti* v *Karuppan Chetti*, I. L. R. 6 Mad. 273). A sued B, who resided in British India, upon a bond, and obtained a decree within the territory of a Native State. Having obtained part satisfaction of this decree, A sued B for the balance in a Court in British India upon the judgment of the Court of the Native State. It was held that the decree of the Court of the Native State was made with jurisdiction and that the suit in the Court in British India could be maintained (*Kaliyugam Chetti* v. *Chokalinga Pillai*, I. L. R. 7 Mad. 105). A sued B in a British Court and obtained a decree. He then sued on that decree in a Native Court of Gwalior. During the pendency of the suit, the town in which the suit had been instituted, was ceded to the British Government. It was held that the suit, though it could not have been maintained, if instituted in a Court of British India, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court in which it had been instituted, and was not barred by section 13 of the Civil Procedure Code: (*Saloni* v. *Harlal*, I. L. R. 10 All. 517. The Bombay High Court have decided that a suit upon the judgment of a Court of a Native State is not maintainable in a Court in British India, and that the only mode by which the decree of such a Native Court can be enforced is that provided by section 434 of the Code of Civil Procedure, which enacts that "the Governor-General in Council may from time to time by notification in the *Gazette of India* (*a*) declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and *not established by the authority of the Governor-General in Council*, may be executed in British India as if they had been made by the Courts of British India; and (*b*) cancel

Decrees of Courts in Native States.

any such declaration. So long as such declaration remains in force, the said decrees may be executed accordingly" (*Bhavanishankar Shevakram* v. *Pursadri Kalidas*,[2] I. L. R. 6 Bom. 292). A decree of any Court *established by the authority* of the Governor-General in Council in the territories of any Foreign Prince or State, which cannot be executed within the jurisdiction of the Courts by which it was made, may be executed under the provisions of the Code of Civil Procedure within the jurisdiction of any Court in British India (section 229 of the Code). The fact that a judgment has been obtained in a foreign Court upon a decree of a Court in British India will not prevent the execution of such decree by a Court in British India (*Fakirudin Mahomed Assan* v. *The Official Trustee of Bengal*, I. L. R. 7 Calc. 82).

In the case of *Balaram Gui* v. *Kamini Dasi* (4 W. R. 108), instituted while the old Code of 1859 was in force, the plaintiff sued on a judgment pronounced by the French Court at Chandernagore; and it was held that, if there was no reason to question this foreign judgment *upon the ground of fraud or want of jurisdiction*, or that it was unduly obtained, the Court should accept it as conclusive between the parties, and should not inquire into the merits of the case or the propriety of the decision (see also *Madhu Bibi* v. *Ram Manickya Day*, 6 W. R. Civ. Ref. 31: and *Mahomed Ahmed* v. *Alibar Ghazi*, 10 W. R. 337). In *Mathappa Chetti* v. *Chellapa Chetti* I. L. R. 1 Mad. 196), A, a Hindú British subject, neither domiciled, resident, nor possessing property in the Foreign State of Pudukotta, on the occasion of a casual visit drew a bill for a sum due to B, a resident of that State. B sued A on this bill in the Civil Court of Pudukotta: and having obtained a decree, sued A thereupon in the subordinate Court of Madura. A pleaded that the Pudukotta Court had no jurisdiction to make the decree; and this was held to be a good plea, for that the mere making of a contract within the jurisdiction of a foreign Court does not necessarily render that Court competent to adjudicate upon all the obligatory relations which flow directly or indirectly from it.

Section 14 of the Code of Civil Procedure provides further on the subject of foreign judgments as follows:—

When foreign judgment no bar to suit in British India.

"No foreign judgment shall operate as a bar to a suit in British India—

(*a*) If it has not been given on the merits of the case.

(*b*) If it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India.

(*c*) If it is in the opinion of the Court before which it is produced contrary to natural justice.[3]

(*d*) If it has been obtained by fraud.

(*e*) If it sustains a claim founded on a breach of any law in force in British India.

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[2] Dissented from in *Sama Rayar* v. *Annamalai Chetti*, I. L. R. 7 Mad. 164.
[3] See *Hinde & Co.* v. *Ponnath Brayan*, I. L. R. 4 Mad. 359.

The effect to be given to foreign judgments will be found discussed in the note to the *Duchess of Kingston's* case, 2 Smith's Leading Cases, pp. 813—845; in Westlake's Private International Law, §§ 361—378; and in Story's Conflict of Laws, §§ 584—618. The result of the authorities seems to be that a foreign judgment will not be conclusive if it appear on the face of the proceedings that it is founded on an incorrect view of the English law, knowingly or perversely acted on—or of the law of nations—or if it offend common reason and justice—or if it be grossly defective—or if it be shown by extrinsic evidence that the Court which pronounced it had no jurisdiction—or that it was obtained by fraud—or by means clearly contrary to natural justice, as, for instance, without any notice, summons, or equivalent proceeding.[4] These principles have been generally adopted in the existing provisions of the Code of Civil Procedure. As to whether a foreign judgment can be impeached on the merits, there has been very considerable doubt and conflict of opinion, which have been probably a good deal increased by arguments in which it was assumed that no distinction existed between the claim to question a foreign judgment on the merits and to question it upon the ground of fraud or want of jurisdiction, or that it was unduly obtained. There is no doubt that a foreign judgment cannot be conclusive unless it be shown to be so in the country where it was pronounced; but it appears to be now settled that where an action is brought on the judgment of a foreign or colonial Court having jurisdiction *over the parties and the subject-matter of the suit*, it cannot be impeached on the ground that it is erroneous on the merits. This principle has been substantially adopted in India, the term "Court of competent jurisdiction" in section 13 of the Code of Civil Procedure of 1877 being wide enough to include a foreign competent Court,[5] and see *Kandasami Pillai* v. *Moidin Saib*, I. L. R. 2 Mad. 337: and *Bababhat* v. *Narharbhat*, I. L. R. 13 Bom. 224.

Under section 434 of the provisions of the Code of Criminal Procedure the existence of a previous judgment or order prevents a Court from holding a trial. *Nemo debet bis puniri pro uno delicto* is a maxim of natural justice; and it is also just that a person, who has been formally tried for an offence and acquitted, should not be subjected to the harassment of being

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[4] The question of the conclusiveness of foreign judgments will be found discussed in the following recent English cases—*Godard* v. *Gray* (L. R. 6 Q. B. 139), where it was held to be no bar to an action on a judgment *in personam* of the foreign Court having jurisdiction over the parties and cause, that the foreign tribunal had put a construction erroneous, according to English law, on an English contract, the mistake of English law being really a mistake as to a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings:—*Castrique* v. *Imrie* (L. R. 4 H. C. 414), where the foreign proceeding was *in rem* and was held conclusive:—*Meyer* v. *Ralli* (35 L. T. Rep. N. S. 838), where the judgment of a French Court, which was clearly wrong according to French law (which could not be a matter of fact before that tribunal), was held not to be conclusive.

[5] The confinement of a man on political grounds under a warrant issued under the provisions of Bengal Regulation III of 1818, is not a bar to a prosecution under the regular criminal law for offences charged to have been committed before such confinement (*The Queen* v. *Amir Khan*, 9 B. L. R. 36, 17 W. R. Cr. 15).

tried over again for the same offence. Accordingly the plea of *autrefois convict or autrefois acquit, i.e.*, of a previous lawful conviction or lawful acquittal, has always been held to be a good plea. But see *Queen-Empress* v. *Husein Gaibu*, I. L. R. 8 Bom. 308. As to the mode of proving a previous conviction or acquittal, see section 511 of the Code of Criminal Procedure.

Relevancy of certain judgments in probate, &c., jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree[6]] declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree[6]] declared that it had ceased or should cease ;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree[6]] declares that it had been or should be his property.

Kanhya Lal v. *Radhacharan.*

With reference to this section, the Select Committee on the Bill remarked in their report as follows:—"For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lal* v. *Radhacharan*, 7 W. R. 339." The following is the judgment delivered

[6] The words in brackets were inserted by the amending Act, XVIII of 1872, s. 3.

in this case by the learned Chief Justice, and concurred in by the other Judges of the Full Bench :—

"This suit was brought by Kanhya Lal, as heir of Ramnarain Singh, for a declaration of his right of heirship, and for possession of certain lands with mesne profits. The other plaintiffs claimed a portion of the estate by purchase from Kanhya Lal.

"*The plaintiff alleged that Ramnarain obtained the property from Júmak Lal, his maternal grandfather, by deed of gift;* that Ramnarain died without issue, leaving Mussamat Deo Kúnwar his widow; and that upon her death the property *descended to the plaintiff as the nephew and heir of Ramnarain*, the plaintiff being the son of Ramnarain's natural brother, and grandson of his natural father.

"*The principal defendant, Radhacharan, denied the plaintiff's right as heir of Ramnarain.* He alleged that *Ramnarain was adopted by Júmak Lal; and that, on the death of Ramnarain without issue*, the right accrued to defendant Radhacharan as an agnate of Júmak Lal, and did not descend to plaintiff as the son of Ramnarain's natural brother.

"The other defendants claimed by purchase from Radhacharan.

"*The plaintiff denied that Ramnarain was adopted by Jumak Lal. The defendants, in support of their allegation of the adoption, relied upon a decree obtained by defendant Radhacharan in a suit brought by him against Mussamat Deo Kúnwar, the widow of Ramnarain, to set aside certain alienations made by her, and to have his title as reversionary heir established.* The suit was defended by Mussamat Deo Kúnwar on the ground that her husband *had not been adopted and that he took the property by deed of gift from Júmak Lal*, and consequently that Radhacharan was not heir in reversion. The present plaintiff presented a petition in that suit, asserting his right on the same ground as that on which he now sues, but the Court held that no order was requisite on his petition, and *he was not made a party to the suit.* The Court in that case found that Ramnarain was adopted by Júmak Lal, and that the then plaintiff and now defendant, Radhacharan, was the reversionary heir. The judgment was affirmed in appeal in 1853.

"*It was contended on the part of the defendants in this case that that judgment was a judgment* in rem *as to the adoption.* On the trial of the case, the Judge, upon the authority of a case reported in the *Weekly Reporter*, Vol. III, page 14, Civil Rulings, in which Rajkristo was appellant, held that the judgment was a judgment *in rem quoad* the adoption, and that it was final and conclusive against the present plaintiff upon that point. The first Bench, before whom this appeal came, felt themselves bound, in consequence of the decision above-mentioned, to refer to a Full Bench the following question, *viz., whether the judgment was admissible as evidence against the plaintiff; and, if so, whether it was conclusive, or merely* primâ facie *evidence against him.*

"The case has been fully argued before us, and we are of opinion, that *the judgment was not a judgment* in rem, *and that it was not admissible in evidence against the plaintiff.*

"The petition of the plaintiff in the suit brought by Radhacharan having been rejected, the plaintiff was no party to that suit.

"The general rule was clearly laid down by Chief Justice DeGrey in the *Duchess of Kingston's* case. In answer to certain questions put to the Judges by the House of Lords, he said:—'It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine' (and he might have added to cross-examine) 'witnesses or to appeal from a judgment which he might think erroneous; and therefore the deposition of witnesses in another case in proof of a fact, the verdict of a jury' (or, in this country, of a Court) 'finding the facts, and the judgment of the Court upon the facts found, *although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers.*' There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them. *From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true;* FIRST, that the judgment of a Court of *concurrent* jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive *between the same parties upon the same matter directly in question* in another Court (or he might have added in another action between the same parties in the same Court); 'SECONDLY, that the judgment of a Court of *exclusive* jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose.' But *neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*

See 2 Smith's Leading Cases, page 424.

"The principle that a judgment is not to be used to the prejudice of strangers was adopted from the civil law, of which the following were maxims, that '*Res inter alios judicata nullum inter alios prejudicium facit*;'[7] or '*Res inter alios acta alteri nocere non debet.*'[8] The principle was not applicable to judgments in actions *in rem*. The exception of judgments *in rem* in the civil law was no doubt the foundation of the exception in the English law.

"The question as to what is a judgment *in rem* was fully considered by Mr. Justice Holloway in Madras Regular Appeal[9] No. 48 of 1864, 2 Stokes and O'Sullivan's Reports, 276. Although I cannot concur in the whole of Mr. Justice Holloway's reasoning, I consider that the full investigation,

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[7] "A matter adjudicated upon between one set of parties in nowise prejudices another set of parties."

[8] "A matter transacted between one set of persons ought not to injure or affect another person."

[9] *Yara Kalamma* v. *Annakala Naramma.*

which the subject received at his hands in that case, has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, *viz.*, that a decision by a competent Court that a Hindú family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or more correctly speaking, in an action *in personam*, is not a judgment *in rem*, or binding upon strangers, or in other words, upon persons who were neither parties to the suit nor privies. I would go further, and say that a decree in such a case is not and ought not to be admissible at all as evidence against strangers.[1]

"I do not think that Mr. Smith's definition of a judgment *in rem* is accurate. But Mr. Justice Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith—'which very declaration operates upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.' This would not be the effect of a finding upon a question of *status* in a suit *in personam*, though it might have been so under the civil law in a suit *in rem*, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the *status*.

"I do not agree with Mr. Justice Holloway in his remark at p. 281 of his judgment—'that the effect of a decree of every competent Court is to render the person or thing that which it declares him, or it, to be.' A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary. According to the civil law a suit, in which a claim of ownership was made against all other persons, was an action *in rem*, and the judgment pronounced in such action was a judgment *in rem*, and binding upon all persons whom the Court was competent to bind; but if the claim was against a particular person or persons, it was an action *in personam*, and the decree was a decree *in personam*, and binding only upon the particular person or persons against whom the claim was preferred, or persons who were privies to them.

"This will be made more clear by referring to the note of Mr. Sandars upon section 1, Book 4, Tit. 6, of the Institutes of Justinian, a section which is quoted by Mr. Justice Holloway in his judgment above referred to. He says:—'*The first and most important division of actions is that into actions* in rem *and actions* in personam: *by the first of which we assert a right over a thing against all the world: by the second we assert a right against a particular person* (see Introduction, section 61), and accordingly, speaking technically, an action was called *real*, when the formula in which it was conceived embodied a claim to a thing without saying from whom it was claimed; and *personal* when the formula stated upon whom a claim was made. If Titius said that a piece of land belonged to him, there was no

[1] But see now section 13, *ante*, pp. 99—106; and sections 42 and 43, *post*.

necessity that the name of the wrongful occupier should appear in the formula, at any rate not in the *intentio*,[2] the part of the formula always considered characteristic of the *actio*. *Si paret Titii esse rem*—this was all; the question to be decided was—does the thing belong to Titius? It was only as a consequence of Titius's proprietorship being established that the wrongful occupier, whose name might appear in the *condemnatio*, was condemned to lose the possession. But, in an action arising on a contract, the name of a person was necessarily introduced into the *intentio*. *Titius* could not merely say that a thing was owed to him, he must add that it was owed by a particular person. There are, indeed, some cases, as for instance a deposit, in which the action may be equally well shaped with or without the insertion of the name of a particular person. There may either be a real action in which the plaintiff claims the thing, or a personal one, in which he says that the depositary ought to give it him. Whenever the action is made to rest on an obligation, it is personal; when on a right of proprietorship, it is real.'

"The case is made still more clear in para. 61 of the Introduction. There Mr. Sandars says:—'His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly; the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing confers. Sometimes the claim is more indirect; the claimant insists that there are one or more particular individual or individuals, who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages on the analogy of terms found in the writings of the Roman jurists, by the phrase *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, as well as a thing as its object—a right which gives its possessor a power to oblige another person to give or procure, or do or not do, something. It is true that in a real right the notion of persons

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[2] "The formula usually consisted of three distinct parts called *demonstratio*, *intentio*, and *condemnatio*.

The *demonstratio* stated shortly what had given rise to the litigation.

The *intentio* set forth the plaintiff's claim and the question which the *judex* was called upon to decide.

The *condemnatio* gave the Judge power to condemn or acquit the defendant, according to the result of his examination of the affair."—*Lord Mackenzie's Studies in Roman Law*, p. 303.

is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done.'

"Besides actions *in rem* which related to property, there were certain actions called *actiones prejudiciales*. Of these it is said in the Institutes, Book 4, Tit. 6, s. 13, that they seem to be actions *in rem*, such as 'those by which it is inquired whether a man was born free or had been made free; whether he was a slave, or whether he was the offspring of his reputed father.' These actions no doubt were the origin of the rule laid down as to judgments on actions, in which questions relating to *status* were determined.

"Mr. Sandars, in his note to that section, says:—'The object of a *prejudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings.[a] Such actions differ from actions *in rem*, because in an *actio prejudicialis* no one is condemned, only the fact is ascertained, but they are said in the text to resemble actions *in rem*, because they were not brought on any obligation, and because in the *intentio*, which indeed composed the whole formula in this case, no mention was made of any particular person. Questions of *status*, such as those of paternity, filiation, and the like, were most commonly the subject of *actiones prejudiciales*, but were by no means the only ones. We hear of others.'

"In Austin on Jurisprudence, Vol III, page 165, it is said:—'In case a child is detained from his father, the latter can recover him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action *in rem*. In case a slave be detained from his master's service, the master can recover him *in specie* from the stranger who wrongfully detains him.' It is a mistake, I think, to call such actions *in rem*; they are strictly actions *in personam*. An action by a person alleged to be a slave, claiming to have it declared as against all men that he was a freeman, was an *actio prejudicialis* in which the judgment would have contained a declaration upon the *status*.

"Great misunderstanding and error have been caused, as is shown by Mr. Justice Holloway, from the use of the words '*status*' and 'judgments *in rem*' in some of our English text-books, without any precise definition, and indeed in some cases without any accurate conception of their meaning. For instance, I have seen it stated that 'judgments declaring personal *status* or condition, as judgments of adultery, are conclusive upon all the world.' What a judgment of adultery is, or how adultery can be said to declare a personal *status* or condition, it is difficult to conceive. Possibly it means a

[a] The *actio* is the legal remedy by which a private person, called the *actor* or plaintiff, enforces a private lawful claim . . . . According to their object actions are divisible into:—(1) Those instituted for the purpose of obtaining a judgment against the defendant who is called *reus*; (2) Those which proceed for the preliminary recognition of a certain relation (*actiones prejudiciales, &c.*) *Modern Roman Law*, by Tomkins and Jencken, p. 85.

judgment of divorce on account of adultery; but, if so, it is not a judgment *in rem*, or conclusive upon all the world of the fact of adultery.

"It is unnecessary to consider more minutely the civil law upon the subject of judgments *in rem* or of *actiones prejudiciales*. It is sufficient to say that they were not actions *in personam*, and that the claims in them were advanced generally against every one, and not against particular individuals.

"From what has been said, it will be readily seen that there are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty jurisdiction, which answer to the actions *in rem* of the civil law,[4] and none corresponding with the *actiones prejudiciales*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is, therefore, unnecessary to refer to them. We have not as yet any suits here for divorce *a vinculo matrimonii*, so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits.[5]

"Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce or sets aside a marriage between Muhammadans or Hindús, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit, as Mr. Justice Holloway appears to think, for, if they had notice, they could not intervene or interfere in the suit; but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons; a valid marriage causes the relationship of husband and wife not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Muhammadan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.

"The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (see cases referred to in Smith's Leading Cases, Vol. II, page 439),[6] and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive, nor even primâ facie, *evidence against strangers that the*

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[4] The Privy Council appeared inclined to approve this view in *Jagendro Deb Rai Kut* v. *Fanendro Deb Rai Kut*: see remarks, 14 Moo. I. A. 374. See also *The General Manager of Raj Durbhunga* v. *Maharaja Kumar Ramapat Singh*, 14 Moo. I. A. 616.

[5] This judgment was pronounced in 1867, *i.e.* two years before the passing of "The Indian Divorce Act," IV of 1869.

[6] See section 43, *post*.

cause for which the decree was pronounced existed. For instance, if a divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *primâ facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So, if a marriage between Muhammadans were set aside upon the ground of consanguinity or affinity—as, for instance, in the case of a Muhammadan, that the marriage was with the sister of another wife then living—the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.

"It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question, and The Indian Succession Act, No. X of 1865, section 242, points out expressly the effect which they are to have over property and the extent to which they are to be conclusive.

"It is quite clear that there are no judgments *in rem* in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers, either as conclusive or even as *primâ facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment, or by the finding, upon any issue raised in the suit whether relating to *status*, property, or any other matter.[7]

"If a judgment in a suit between A and B that certain property, for which the suit was brought, belonged to A, as the adopted son of C, were a judgment *in rem*, and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. For instance, suppose that a Hindú, one of four brothers, should be entitled to a separate estate consisting of a large zemindari, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant zemindarí, and that, upon his death without issue and without leaving a widow, the surviving brothers, as his heirs, should enter into possession, and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Munsif's Court to recover the land so sold upon the ground that, he being the heir by adoption, the brothers of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant, without any collusion in establishing the alleged adoption, might succeed and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now, if this judgment were a judgment *in rem*, and conclusive against the brothers as to the *status* created by the alleged adoption in a suit brought against them for the zemindarí, they would have no means of defending their possession,

[7] But see now section 13, *ante*, pp. 99—106; and sections 42 and 43, *post*.

however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Munsif's Court was perfectly honest and *bonâ fide*, and that the Munsif's Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment *in rem*, and there would be no means of getting rid of the decree of the Munsif's Court, and thus the decree of the Munsif in a suit for land within his competency would finally and conclusively determine the title to the zemindari against persons who might never have heard of the suit in the Munsif's Court whilst it was going on. There is no ground upon which it could be held that the decree in such a case would be admissible merely as *primâ facie* evidence. It must either be conclusive as a judgment *in rem* or fall within the general rule, and not be admissible at all upon the question of adoption. If it could be admitted as even *primâ facie* evidence, it might work the greatest injustice by throwing the burden on the defendants, and compelling them to prove a negative, *viz.*, that the claimant had not been adopted; and this, probably, after many years from the time at which the adoption is alleged to have been made. The fact is, that the Munsif in such a case would be competent to try the rights of the parties to the lands claimed, and *incidentally to determine the question of adoption*. But he would have no power to entertain a suit merely for the purpose of determining a question of *status*.

"We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 26th September, 1853, was not admissible either as *primâ facie* or conclusive evidence against the plaintiff upon the question of adoption.

"This decision is quite in accordance with the decision of the Privy Council in the Rajah of Shivagunga's case, reported in 9 Moo. Ind. Ap., page 539. In that case, their Lordships remarked that 'a judgment is not a judgment *in rem*, because in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*.

"In the case No. 299 of 1864, in consequence of which this case was referred to the Full Bench, the Judges, referring to the Shivagunga case, say:—'In 'Goodeve on Evidence,' pp. 288, 290, adoption like marriage and bastardy is expressly mentioned as one of the cases in which a judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the case (the Shivagunga case) reported at pages 36 and 37 of the *W. R.* for April, 1865, No. 12, seems to point to the same conclusion.' So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve."

In *Jagendro Deb Rai Kut* v. *Fanendro Deb Rai Kut* (14 Moo. I. A. 367: 11 B. L. R. 244), the facts were as follow:—The Rajah of Jalpaigori died leaving several wives and concubines, amongst whom were A, B, and C. He left a minor son by A, named R; and a son by B, named M; and a

posthumous son, F, was born of C. A succeeded in getting the name of her son R registered in the Collectorate as proprietor of the estate. M then applied to the Civil Court and obtained an order in his favour under Act XIX of 1841, under which he obtained possession of the Raj and the property thereto belonging. On this, A instituted a regular suit to establish the right of her son R to the whole of the property, moveable and immoveable, alleging that R was the legitimate son o he deceased Rajah and a preferable heir to M, who was the son of a slave girl. This suit was finally decided by the Sadr Diwáni Adálat in favour of M, who in consequence held the Raj till his death, and was then succeeded by his eldest son, who, dying without a son, was in 1865 succeeded by his brother X. In 1866, a suit was instituted against X on behalf of F, who was then a minor, in which the succession was claimed for him as the legitimate son by a married wife of the first class, and therefore a preferable heir to M, who, it was again alleged, was the son of a slave girl. To this suit the decree of the Sadr Diwáni Adálat in the former suit was pleaded as conclusive evidence of M's right to succeed. The District Judge held that this decree had the force of a judgment *in rem* and was conclusive against the whole world as to M being the rightful heir. The High Court reversed this decision, and the Privy Council upheld the judgment of the High Court. Their Lordships, having observed that it appeared to them extremely doubtful whether there exists in India (exclusive of the particular jurisdictions exercised by the High Courts in matters of Probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving what can be called technically a judgment *in rem*, said:—"In the present case the plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit as to the illegitimacy of M; but he also raises the question of a priority of right by reason of the superior nature of the marriage between the *rajah* and his mother. The issues in the two suits, therefore, are not precisely the same. But, if they had been precisely the same, their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any way be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country, there could not be a pretence for saying that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for possession, by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party. It therefore seems to their

Lordships unnecessary to consider whether any ordinary *Zillah* Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, *viz.*, that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it."

The term 'judgment *in rem*' is not, it may be observed, used in The Indian Evidence Act, though section 41 of the Act incorporates the law on the subject of judgments *in rem*, as explained in the above decision of the Calcutta High Court. It may not, however, be out of place to give some account of the origin and meaning of a term, as to which some confusion of idea has occasionally existed. I venture to think that an accurate conception of what the term itself implies, and of how it came to imply this, will conduce to a clear understanding of the law, and to its correct application.

The term 'judgment *in rem*'

In all the instances in which the phrase '*in rem*' occurs, the subject to which it is applied is a something which avails generally, *quod generatim in causam aliquam valet*. "How the phrase '*in rem*' came to acquire this meaning," says Mr. Austin, "it is not very easy to perceive. It is one of the elliptical expressions with which language abounds, and which too frequently obscure the simplest and easiest notions. In this instance it might be possible to restore the links which are dropped, to connect '*res*' (as signifying a thing) with '*in rem*' (as signifying *generality*); but I have neither space nor time for merely etymological researches. To mark the important purpose to which the phrase may be turned, is matter of more moment. Although it is applied by the Roman lawyers to a considerable number of cases, they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously 'rights of *every* description which avail against persons *generally*.' The large generic expression '*jus in rem*' is not to be found in their writings. This expression was devised by the Glossators or by the Commentators who succeeded them. Seeing that the phrase '*in rem*' always imported *generality*, and feeling the need of a term for '*rights* which avail generally,' they applied the former to the purpose of marking the latter and talked of '*jura in rem*.' . . . . . Now, the expression '*jus in rem*,' in this its analogical meaning, perfectly supplies the *desideratum* which is stated above. For as '*in rem*' denotes *generality*, '*jus in rem*' should signify *rights* availing against persons *generally*. Therefore it should signify *all* rights belonging to that *genus*, let their specific differences be what they may."[8]—The phrase '*in rem*' in the expression '*jus in rem*' does not therefore mean 'over or against a thing,' nor has it any reference to *things* as the subject of rights; but it means 'generally.' To use Mr. Austin's language, 'the phrase *in rem*' denotes the *compass*, and not the *subject*,

Meaning of '*in rem*.'

[8] *Austin's Lectures on Jurisprudence*, pp. 991 and 992, edition of 1869, by Robert Campbell—London: John Murray.

of the right. It denotes that the right in question avails *against the world at large.* Comparing the phrase '*jus in rem*' with the other phrase '*jus in personam*,' Mr. Austin remarks:—"'*jus in personam*' (*certam sive determinatam*) is expressive and free from ambiguity. Cut down to '*jus in personam*, it is also sufficiently concise. *Jus in rem*, standing by itself, is ambiguous and obscure; but, when it is *contradistinguished* from *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed."[9]

Jus in personam, therefore, means a right which avails *exclusively* against a *determinate* person or against *determinate* persons. *Jus in rem* means a right which avails *against the world at large.*[1] Mr. Austin gives the following example:—A contracts to deliver a certain moveable to B. If A neglect or refuse to deliver, B can sue him to compel delivery or for damages for non-delivery. B has, in fact, a *jus in personam*, or right against a determinate person, A; but has no right against strangers to the contract between him and A. If, however, A deliver the moveable to B, in consequence of the delivery by A and the concurring apprehension by B, the thing becomes the property of B, who acquires a *jus in rem*, a right over the thing, or a right in the thing as against all mankind.

Mr. Austin then points out very clearly that *jura in rem* are of three kinds:

Jura or Rights *in rem.*

I.—Rights *in rem*, which are rights over *things*:

II.—Rights *in rem*, which are rights over *persons*:

III.—Rights *in rem*, which have *no determinate subjects* (persons or things).

Of the *first* class, the *moveable* already referred to is a sufficient *illustration.* After delivery, it becomes the property of B as against all the world. B acquires therein a *jus in rem.*

Treating of the *second* class, Mr. Austin points out that a person who is the *subject* of a *jus in rem* is placed in a position *like* the position of a *thing* which is the subject of a similar right, and may be styled by analogy *a thing.*[2] He gives as examples of this class the right of the father to the custody and education of the child, and that of the guardian to the custody and education of his ward, and the correlating conditions of husband and wife. "But considered from another aspect," he observes, "these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally* or against the world at large, and the duties to which they correspond are invariably *negative.* As against other persons generally, they are not so much rights to the custody and education of the child, &c., as rights to the *exercise* of such rights *without molestation by strangers.* As against strangers, their substance consists of duties incumbent upon strangers, to forbear or abstain from acts inconsistent with their scope or purpose."

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[9] *Austin's Lectures on Jurisprudence*, p. 990.
[1] *Id.*, pp. 380, 814.
[2] *Id.*, pp. 396-397.

Passing to the *third* class, Mr. Austin gives the following examples: A man's right or interest in his *good name*, which right avails against persons, as considered generally and indeterminately; a monopoly or the right of selling exclusively commodities of a given class, all persons *other* than the party in whom the right resides being bound to forbear from selling commodities of this particular class; franchises; and, lastly, a right in a *status* or condition (considered as an aggregate of rights and capacities). "To determine precisely what a *status* is, is, in my opinion," says Mr. Austin, "the most difficult problem in the whole science of jurisprudence." Elsewhere he lays down the following propositions as to what constitutes a *status*:

Status.

1*st*.—The notion is not capable of being fixed with perfect exactness. There are sets of rights and duties, capacities and incapacities, which one person might deem to constitute *status*, while another might refer them to the law of *Things*.

2*nd*.—The distinction between the rights and duties, capacities and incapacities constituting a *status*, and any other rights, duties, capacities and incapacities, is not susceptible of any strict definition.

3*rd*.—There is no generic character common to them all, but they bear the following marks:—(*a*) They reside in an individual as belonging to a class; (*b*) the rights and duties, capacities and incapacities constituting a *status*, commonly impart to the party invested with them a conspicuous character, and have an extensive influence over his social relations, though this is not a certain mark of *status*; (*c*) they regard specially the class of persons by whom the *status* is borne: (*d*) this last circumstance constitutes the *rationale* of the distinction between the law of *things* and the law of *persons*.

The following remarks of Mr. Austin are also important —"The reason why *status* or *condition* makes so little figure in the English law as compared with the Roman, though the idea must of course exist in all systems of law, seems to be this, that the right in a *status* may by the Roman law be asserted directly and explicitly by an action expressly for its recovery, while in English law no such action can be brought, and the right to a *status*, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode incidental to an action of which the direct purpose is something else. Thus, a question of legitimacy, which is precisely a question of status, is usually brought in and decided upon incidentally in an action of ejectment. . . . . The only case in which a question of *status* is decided directly in English law is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another Court."[3] The term "legal character," used in The Indian Evidence Act, is, as near as may be, the English equivalent for status.[4]

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[3] *Austin's Lectures on Jurisprudence*, edition of 1869, pp. 401-402.

[4] See also, as to *status*, Westlake's Private International Law, pp. 379-389.

So far of *jura in rem*; but what of *judgments in rem?* Is every judgment which creates a *jus in rem*, *a judgment in rem?* I venture to think not; at least, if by *jus in rem* is meant all that class of rights which the Glossators or Commentators designed to express by this phrase, as opposed to those rights which they distinguished by the other phrase, *jus in personam*. Suppose, for instance, a successful action for the *moveable* which Mr. Austin gives as an example in speaking of the *first* class above-mentioned of rights *in rem* over things. B, having obtained the moveable by the action of a Court of Justice, would acquire in it a *jus in rem* none the less than if A had delivered it voluntarily; but such a judgment would not be a *judgment in rem*. It is, therefore, possible for a judgment to create a *jus in rem* over a thing without being a judgment *in rem*. With regard to *jura in rem*, which are rights over persons (the *second* class), Mr. Austin observes that all, or nearly all, of them are matter for the law of persons and the law of *status*. As to the *third* class, in so far as they are concerned with *status*, I have already given Mr. Austin's remarks. The more these remarks and Mr. Austin's whole dealing with the subject are examined, the more clear it will be that every judgment which creates a *jus in rem* is not a *judgment in rem*. It is true that every *judgment in rem* creates a *jus in rem*, but the converse of this proposition is not true. In fact, I venture to think that there is no more exact connection between the term *jus in rem*, (which was a phrase invented by the later civilians on the analogy of a term which was used, as Mr. Austin says, by the Roman lawyers in a very much more partial sense) and the term *judgment in rem* (which was a phrase invented by lawyers of later age), than there was between the *jus in rem* of the civilians and the term from which it was borrowed, and which was used by the Roman lawyers. I take the truth to be this: According to the Roman system there were certain forms of proceeding by which claims could be advanced against all men. These were called *actiones in rem* (see Sandars's note on section 1, Book 4, Title 6 of the Institutes of Justinian), or *real actions*. "A real action," says Lord Mackenzie (Studies in Roman Law, p. 307), "is that which arises from a right in the thing itself—*in re*, either as proprietor, &c.," *i.e.*, a right as against every one else. "A personal action is founded on an obligation undertaken by another." Mr. Sandars and Lord Mackenzie think that *in rem* in the phrase *jus in rem*, invented by the civilians, corresponds to *in re* in the phrase *jus in re* used by the classical jurists, but I apprehend that this is not so. *Jus in re* meant *jus in aliena re*. A servitude over another man's land, for example, was a *jus in re*. The term "*in rem*" is found in Justinian and elsewhere; but in connection with "*actio*," not with "*jus*." It was called an *actio in rem* (see Justinian's Institutes, Book 4, Title 6, section 1), in opposition to an *actio in personam*, because the former action went upon the right to or over the thing, the latter went upon the right against or over the individual. The effect of the latter action was to conclude the individual only; the effect of the action *in rem* was to conclude the whole community. This effect was

Judgments *in rem* and *jura in rem*.

an accident arising from the particular system, but those who have studied the curious history of words and their meanings will understand how natural it was that the words "*in rem*" should remain to express the effect of this action long after Roman forms of procedure had passed away. It was most natural that the civilians of the twelfth or thirteenth century, when making their division of rights which avail against the world, and rights which avail against individuals only, should select the words "*in rem*," to express the former, or should be led to use them in the very meaning which they had then come to have. "*In rem*" had come to mean "generally," and to be applied to that which avails against all mankind; and out of it and "*jus*" was compounded a term which meant "a right good against the whole world." When lawyers of a later age wanted to express that a judgment availed against the whole world, they took the same term and compounded it with "judgment." It may be interesting to note the three stages: 1st.—*Actio in rem* created what was in fact a right good against all mankind. 2nd.—The civilians applied the term *jus in rem* as a class-term to all such rights, but it is clear that all such rights were not the creation of the Roman *actio in rem*, i.e., that there were *jura in rem* other than those which were created by *actiones in rem*. 3rd.—Later lawyers coined the term *judgment in rem* to express a judgment which has the same essential difference from other judgments, *viz.*, being good against all mankind, as a *jus in rem* has from other *jura*; but it does not follow as a necessary consequence from this that all judgments which create *jura in rem* are "*judgments in rem*."

Mr. Austin points out that "*in rem*" denotes the *compass*, not the *subject*, of the right. So "*in rem*" denotes the *compass*, not the subject, of the judgment. "*Judgment in rem*" is a name given to a particular *kind* of judgment. What kind, the words "*in rem*" do not indicate save by their history, as I have attempted to give it. The effect of such a judgment is not to be explained by the nature of the procedure necessary to obtain it. Sir Barnes Peacock has very clearly shown that it is an error to explain it on the principle that every one is presumed to have had notice of the suit, for, even if they had notice, they could not intervene or interfere.

I think the result then is, that the only definition of "*judgment in rem*" which can properly be given is, that it is a "judgment which binds all men, and not only the parties to the suit in which it was passed and their privies;" and that it belongs to positive law to say what judgments are to be judgments *in rem*, whether for reasons of international comity or of domestic expediency. As the above section of the Indian Evidence Act stands, a judgment, in order to have this effect, must have been pronounced by a *competent* Court in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction. Civil Courts in India, other than the High Courts, have *probate* jurisdiction under the provisions of The Indian Succession Act, X of 1865 (see Part XXXI, sections 235, and following sections. As to Hindús, &c., see Act XXI of 1870: and as to Hindús, Muhammadans, Buddhists and

Probate.

others, see 'The Probate and Administration Act,' V of 1881). A grant of *probate* or of *administration* actually invests the executor or administrator with the character which it declares to belong to him, and is conclusive against all the world. It may, indeed, be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it not to be the act of the Court at all; or that it was granted by a Court having no jurisdiction,[5] for then it is a nonentity. But it cannot be shown that the testator was mad or that the *will* was forged, for these facts might have been alleged in the Court, which had jurisdiction to grant probate or administration, in opposition to such grant.[6]

It has been held that section 41 of the Evidence Act applies to probates granted prior to the passing of the Hindú Wills Act, as well as to those granted after it: *Girish Chandra Rai* v. *Broughton*, I. L. R. 14 Calc. 861.

Matrimonial jurisdiction.

Civil Courts in India, other than the High Courts, have Matrimonial jurisdiction under the following Acts now in force, *viz.*—IV of 1869, "The Indian Divorce Act," relating to the divorce of persons professing the Christian religion; —XV of 1865, relating to marriage and divorce among Parsis;—XXI of 1866, "The Native Converts' Marriage Dissolution Act;"—XV of 1872, "The Indian Christian Marriage Act;"—and III of 1872, relating to marriage between persons not professing the Christian, Jewish, Hindú, Muhammadan, Parsí, Buddhist, Sikh, or Jaina religion.[7]

Admiralty jurisdiction.

As to the Admiralty jurisdiction of the High Courts, see section 32 of the Letters Patent of 1865 for the Calcutta High Court, and the corresponding sections of the other Letters Patent for the other High Courts. As to the Admiralty jurisdiction of the Mufassil Courts, see 12 and 13 Vict., cap. 96; and 23 and 24 Vict., cap. 88. It is with reference to vessels condemned as *prizes* more especially that questions concerned with Admiralty jurisdiction arise, such a sentence of condemnation by a competent Court being usually conclusive upon all the world.

Insolvency jurisdiction.

For the law regulating the Insolvency jurisdiction of the High Courts, see the 11 and 12 Vict., cap. 21; and for the Calcutta High Court, section 18 of the Letters Patent of 1865; and for the other High Courts, the corresponding sections of their respective Letters Patent. Such Insolvency jurisdiction, as can be

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[5] See Section 44, *post*.

[6] See 2 Smith's Leading Cases, p. 804: *Brajanath De Sirkar* v. *Anandamayi Dasi*, 8 B. L. R. 208: *Kamal Lochan Datta* v. *Nitratan Mandal*, I. L. R. 4 Calc. 360: *and in the matter of the petition of Nilmani Singh*, I. L. R. 6 Calc. 429. As to the Probate jurisdiction of Foreign Courts, see Westlake's Private International Law, pp. 278—310; and Story on the Conflict of Laws, §§ 507—529*m*.

[7] With reference to the judgments and orders of Foreign Courts in matrimonial causes, see Westlake's Private International Law, pp. 315—360; and Story on the Conflict of Laws, §§ 200—230*d*.

exercised by the Mofussil Courts, is regulated by Chapter XX of the Code of Civil Procedure, Act XIV of 1882.[8]

The section does not expressly mention Courts-Martial; but it will be remembered that Native Courts-Martial are included in the operation of the Act (note to section 1, *ante* p. 82).[9] It may be observed that a judgment *in rem* will, under the above section of the Indian Evidence Act, be conclusive in a criminal equally as in a civil proceeding—a proposition as to which there is some doubt in English law; see 2 Smith's Leading Cases, 804-805; and Taylor on Evidence, §§ 1493-1494, §§ 1680-1681, 8th edn.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.

42. Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

[See *ante*, pp. 99—106, and *Gajju Lal* v. *Fatteh Lal*, I. L. R. 6 Calc. 171 : 6 C. L. R 439. As to "conclusive proof," see *ante*, p. 89.]

An instance of decisions in former suits being admitted in evidence under the provisions of this section is to be found in *Ramasami* v. *Appavu*, I. L. R. 12 Mad. 9.

Judgments, &c., other than those mentioned in sections 40 to 42, when relevant.

43. Judgments, orders or decrees other than those mentioned in sections 40, 41, and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.[1]

Illustrations.

(*a*) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous

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[8] As to the effect of Foreign Judgments in Bankruptcy and Insolvency, see Westlake's Private International Law, pp. 262—278; and Story on the Conflict of Laws, §§ 403—423*b*.

[9] As to Courts-Martial, see 2 Smith's Leading Cases, 810, and cases there quoted.

[1] See Explanation 2, sec. 54, *post*.

is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(*b*) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(*c*) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(*d*) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(*e*) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.[2]

(*f*) A is tried for the murder of B. The fact that B prosecuted A for libel, and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.[2]

Garth, C. J., in *Gajju Lal* v. *Fatteh Lal*, has said with reference to this section "The cases contemplated by section 43 are those where a judgment is used not as a *res judicata* or as evidence more or less binding upon an opponent by reason of an adjudication which it contains. But the cases referred to in section 43 are such, I conceive, as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in section 43." *Straight, J.*, in *The Collector of Gorakhpur* v. *Palakdhari Singh*, I. L. R. 12 All. 25, says: "Section 43 of The Evidence Act declares that judgments, orders and decrees other than those mentioned in sections 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have

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[2] Illustrations (*e*) and (*f*) have been added by section 5, Act III of 1891.

any such effect or operation as mentioned in those recited sections *qua* judgments, orders and decrees, but I do not take this to make them absolutely inadmissible, when they are the best evidence of something that may be proved *aliunde*."

So, too, though a judgment against A will not be evidence against B except in those cases which have been already provided for by the Evidence Act yet, where A sues B for negligence as his agent, he may, in order to prove the *consequences* of the negligence to himself, produce the record of a judgment obtained against him by a third party in an action brought to recover damages for the effect of such negligence. Such judgment is evidence as to the quantum of damages, though not as to the fact of the injury.[3] Again, if a person charged with an offence under the Indian Penal Code were acquitted, the record would be conclusive evidence to establish the *fact of acquittal* in a civil suit by him against the prosecutor to recover damages for a malicious prosecution; but it would be no evidence that the defendant in the civil suit was the prosecutor in the criminal case; or of malice; or of want of probable cause; and the defendant notwithstanding such acquittal would be entitled to prove the plaintiff's guilt.[4] So, a judgment recovered against a surety will be evidence for him to prove the *amount* which he has been compelled to pay for the principal debtor, but it will be no evidence of his having been legally liable to pay that amount through the principal's default. If one of two or more persons, who have jointly borrowed money and have executed a joint bond, be sued for and have to pay the whole debt, the judgment will be evidence of the amount which he had to pay, if he afterwards sue his co-obligors for contribution, but it will be no evidence of the genuineness of the bond, of the joint liability, or of the shares in which the co-obligors are respectively liable. A, B, and C were joint owners of certain land. During the minority of C, A and B gave a *maurasi* lease to X. C, on attaining his majority, sued A, B, and X successfully to have this lease set aside. Upon this, X sued A and B, to recover the one-third portion of the purchase-money which represented C's share, alleging fraud on their part. It was held that the judgment in the previous case was not evidence of the fraud so alleged (*Dúrga Charan Bhattacharjya* v. *Shasi Bhúsan Mitra*, 5 W. R. S. C. C. Ref. 23). Upon a trial for intentionally giving false evidence in a stage of a judicial proceeding (section 193 of the Indian Penal Code), the record will be evidence that there was a judicial proceeding and of the stage in which the evidence charged as false was given. In a trial for intentionally or negligently suffering to escape a person *convicted* of an offence (sections 222-223 of the Penal Code), the record will be evidence of the conviction. In an action to recover lands, a decree in a suit between the defendant's father and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate *as his own property*, was held admissible on behalf of the defendant, not as proof

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[3] See 2 Smith's Leading Cases, 785, and cases there cited.
[4] Taylor on Evidence, § 1480, § 1667, 8th edn., and cases there cited.

of any of the facts therein stated but for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate.[5] The principle upon which judgments *inter alios* are thus admitted is explained by English text-writers to be this, that the *record is matter of inducement* or merely introductory to other evidence.

Judgment in criminal case not evidence in civil case, or *vice versâ*.

It is a general rule, which has been acknowledged and followed in India as well as in England, that a judgment in a criminal case (unless, indeed, admissible as evidence in the nature of reputation) cannot be received in a civil action to establish the truth of the facts upon which it was rendered, and that a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution (Taylor, § 1505, § 1693, 8th edn., and cases there recited: *Nityanand Sarma* v. *Kashinath Naiyalankar*, 5 W.R. 26: *Bissonath Neogi* v. *Hara Gobind Neogi*, 5 W. R. 27: *Dúrga Das Laha* v. *Dúrga Charan Sha*, 6 W. R. Civ. Ref. 26: *Keramatula Chaudhri* v. *Ghulam Hosen*, 9 W. R. 77: *Ali Baksh* v. *Samirudin*, 4 B. L. R. A. C. 31: 12 W. R. 477: *Gagan Chandra Ghosh* v. *The Empress*, I. L. R. 6 Calc. 247: *Aghornath Rai* v. *Radhika Prasad Basu*, 14 W. R. 339: 7 C. L. R. 74: *Ram Lal* v. *Tula Ram*, I. L. R. 4 All. 97). A plea of *guilty* may, however, be evidence of an admission (*Shambhú Chundra Chaudhri* v. *Madhú Kaibart*, 10 W. R. 56).

Decrees as evidence of necessity of alienation.

In suits brought to set aside alienations made by Hindú widows and other persons, who have not an absolute and complete interest in the property alienated, the question is often raised, whether or not the alienation was made for *necessary* purposes. In order to prove such necessity, decrees are frequently produced without evidence being given of the circumstances under which the debts were contracted, for the recovery of which these decrees were obtained. Upon the principle above stated, it might appear that such decrees, though good evidence of the *amount* paid, are not evidence, at least on behalf of the alienors, of the facts constituting the *necessity*. In the case of *Kantu Lal* v. *Giridhari Lal* (9 W. R. 439), A and B, members of a Hindú family subject to the Mithila law, had contracted debts. One of the creditors sued A and B, and obtained a decree for the money due to him. In execution of this decree a portion of the ancestral estate was sold and purchased by M. Several years after, the sons of A and B, making their fathers (who were still alive) parties to the action, sued to recover the property thus alienated, on the ground that the debts had been contracted for immoral and not for necessary purposes. M contended that the existence of the decree, in execution of which the property was sold, was, as far as he was concerned, sufficient evidence of necessity, and that he could not be required to go behind the decree, and the facts apparent on the face of the litigation, and to point out the exact mode in which the sums borrowed by the fathers were spent. The Calcutta High Court were of opinion that the decree was not sufficient, and that further evidence of

[5] *Davies* v. *Lowndes*, 6 Manning and Granger's Rep. 471, 520.

necessity must be given. In the absence of such evidence, a decree was given against M, who thereupon preferred an appeal to the Privy Council. The decision of the High Court was reversed, their Lordships observing: "A purchaser, under an execution, is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the fathers' debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and the execution, and recover back the estate from the defendant:" *Madan Thakur* v. *Kantu Lall* (L. R. 1 I. A. 333: 14 B. L. R. 187: 22 W. R. 56). The principle here laid down was applied to a similar state of facts in the case of *Badri Lal* v. *Kanti Lal* (23 W. R. 260), where the family were alleged to be governed by the Mitakshara law. An *ex-parte* decree was made against B, a Hindú governed by the Mitakshara, in favour of A, to whom he had mortgaged his ancestral immoveable estate. In execution of this decree A attached this estate; but before the execution-sale, B died, whereupon his infant sons and co-heirs filed a petition of objections, which was rejected, and they were referred to a regular suit. The estate having then been sold in execution, they brought a suit against the execution creditor and the execution purchasers for adjudication of their right to and confirmation of possession in the property sold, and to have the mortgage bond, the *ex-parte* decree and the execution-sale set aside. It was found that there was no justifying necessity; and it was held that the purchasers, having bought after the plaintiff's objections, must be taken to have had notice, actual or constructive, of these objections, and therefore to have purchased with knowledge of the plaintiff's claim and subject to the result of the suit to which they had been referred: *Suraj Bansi Koer* v. *Sheo Persad Singh*, L. R. 6 I. A. 88: I. L. R. 5 Calc. 148: 4 C. L. R. 226. In *Latif Hossein* v. *Darsan Lal* (23 W. R. 424), a Hindú widow, acting as guardian of her two minor sons, had borrowed one thousand rupees ostensibly for their benefit, for their marriage expenses. Two years after, the lender of this money obtained a decree against the minors in an undefended suit for the money so lent; and having taken out execution, attached and was about to sell the minors' eight-anna share in the ancestral property. The mother, in order to save this property, sold by private contract a moiety of this eight-anna share for Rs. 2,500, and with a portion of this sum satisfied the decree. One of the minors, on coming of age, brought a suit to recover his half of the moiety so sold, alleging that there was no

necessity which would have justified the sale. The decision of the Privy Council, in *Madan Thakur* v. *Rantu Lal*, which, it was observed, was a decision under the Mithila law, was held to have no bearing on the case; and the High Court considered it obligatory on the purchaser to prove that when the original loan was taken by the widow, it was a loan taken for the benefit of the infants. The case was remanded for the Judge of the lower Appellate Court to try whether the purchaser, upon whom the *onus* lay, had proved that the decree, under which the execution was taken out, was such a decree as would bind the minor's interests.[6]

In order to prove *the existence of a judgment, its date or its legal consequences*, the production of the record or of a certified copy (see section 76, *post*) is conclusive evidence against all the world.

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

The words "not competent" in this section refer to a Court acting without jurisdiction: *Kettilamma* v. *Kelappan*, I. L. R. 12 Mad. 228.

A judgment delivered by a Court not competent to deliver it, *e.g.*, by a Court which had no jurisdiction over the parties or the subject-matter of the suit, is a mere nullity.[7] On the subject of "*jurisdiction*," see note to section 40, *ante*, p. 298.

Judgments obtained by fraud.

With respect to *fraud* or *collusion*, Lord Chief Justice DeGrey said in the *Duchess of Kingston's* case:—"Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal." In *Philipson* v. *The Earl of Egremont*, the Court of Queen's Bench observed that fraud no doubt vitiated everything: and the Court, upon being satisfied of such fraud, has a power to vacate and should vacate its own judgment.[8] "There is," said *Pollock, C. B.*, "no more stringent maxim than that *no man shall be permitted to aver against a record*; but where fraud can be shown, this maxim does not apply.[9] In the case of the *Earl of Bandon*

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[6] But see Mayne's Hindu Law and Usage, paras. 323 and 324, pp. 384 to 389, 5th edn.

[7] For instances of the application of this principle see the following cases:—*Kalka Parsad* v. *Kanhaya Singh*, 7 N.-W. P. Rep. 99; *Sukram Misser* v. *Crowdy*, 19 W. R. 284; *Ganesh Patro* v. *Ram Nidi Kundu*, 22 W. R. 36; *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, I. L. R. 6 Bom. 703.

[8] 6 Adolphus and Ellis' Queen's Bench Rep. 587, 605.

[9] *Rogers* v. *Hadley*, 2 Hurlstone and Coltman's Rep. 247.

v. *Becher*,[1] the House of Lords observed that the validity of a decree of a Court of competent jurisdiction upon parties legally before it may be questioned on the ground that it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit, or if pronounced in a real and substantial suit, *between parties who were really not in contest with each other*." In applying the rule, it makes no difference whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest Court of Judicature in the land; but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[2]

What is fraud?

The Indian Evidence Act contains no definition of the terms "fraud" and "collusion." Writers on Equity distinguish two kinds of fraud, *viz.*, Actual or Positive Fraud and Constructive Fraud. The former is applied to those cases in which there is an *intention* to commit a cheat or deceit upon another person to his injury. "By *constructive* frauds are meant," says Mr. Story,[3] "such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." It is only in connection with the subject of *actual* or *positive* fraud that Mr. Story mentions frauds in verdicts, judgments, decrees, and other judicial proceedings.[4]

The following definition of *fraud* is given in the 17th section of the Indian Contract Act, IX of 1872, and may, perhaps, be usefully borne in mind:—

'Fraud' defined.

"Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact;

(3) A promise made without any intention of performing it;

(4) Any other act fitted to deceive;

(5) Any such act or omission as the law specially declares to be fraudulent.

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[1] 3 Clark and Finnelly's Rep. 510. As to the proper course to be taken in order to set aside a decree obtained by fraud, see *Mewa Lal Thakur* v. *Bhujhan Jha*, 13 B. L. R. App. 11: *Ishan Chandra Safui* v. *Nandamani Dasi*, I. L. R. 10 Calc. 357 (Suit fraudulently withdrawn by minor's guardian without leave to sue again.)

[2] *Shedden* v. *Patrick*, 1 Macqueen's Scotch Cases, House of Lords, 535.

[3] Equity Jurisprudence, § 258.

[4] Equity Jurisprudence, § 252.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence in itself is equivalent to speech."

'Collusion.'

'Collusion' has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds—(1) when the facts put forward as the foundation of the judgment of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.

Who may show fraud or collusion.

That *strangers* to the suit in which a judgment has been obtained by fraud or collusion may give evidence of such fraud or collusion for the purpose of defeating the judgment, is a proposition as to which there has never been any doubt; but, whether an innocent *party* to the suit may show such fraud and collusion is a point upon which the authorities under English law are not agreed. It is said that his proper course is to apply to the Court which pronounced the judgment to vacate it. That a guilty party would not be allowed to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court is wholly in accordance with the legal maxims—*Allegans suam turpitudinem non est audiendus*[6]—*Nemo ex dolo suo proprio relevatur, aut auxilium capiat.*[7] The words of the section, "*any* party to a suit or other proceeding, &c.," are wide enough to include parties to the first suit, both innocent and guilty. It may be questionable if it was intended to include the latter; but see *Ram Saran Singh* v. *Pran Piyari*, 1 W. R. 156, and *Ahmedbhoy Habibhoy* v. *Vulleebhoy Cassumbhoy*, I. L. R. 6 Bom. 703.

In the case of *Nilmani Mukhopadhya* v. *Aimunissa*, I. L. R. 12 Calc. 156, certain property had been mortgaged to the defendant, who instituted a suit on his mortgage and obtained a decree. Subsequently to this decree, the mortgagor sold the property to the plaintiffs. On Nilmani Mukhopadhya attempting to execute his decree, the plaintiffs instituted a suit seeking for a declaration that the mortgage in favour of Nilmani and the decree obtained thereon were fraudulent transactions. It was, however, contended on behalf of Nilmani that, as the plaintiffs had brought the property subsequently to the date of the mortgage decree, they were not entitled to question the validity or *bonâ fides* of that decree, but were absolutely bound by it. The High Court, however, held that this contention was

[5] See Wharton's Law Lexicon. Title "Collusion."
[6] "A person alleging his own infamy is not to be heard."
[7] "No one can be relieved or gain an advantage from his own deceit.

opposed to the express provisions of section 44 of the Evidence Act, and that it was therefore open to the plaintiffs to show that the decree had been obtained by fraud or collusion. They distinguished the case from that of *Bhowabal Singh* v. *Rajendro Pratab Sahai*, 13 W. R. 157 : 5 B. L. R. 321, in which it had been held that a decree until it is set aside is as between the parties to it conclusive both as to the rights of those parties and the character in which they sue. It was said in *Nilmani Mukhopadya* v. *Aimunissa* that the case of *Bhowabal Singh* v. *Rajendro Pratab Saha* did not decide one way or the other the question that was then before the Court.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art [or in questions as to identity of handwriting[8]] are relevant facts.

Such persons are called experts.

Illustrations.

(*a*) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

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[8] The words in brackets were added by the amending Act, XVIII of 1872, s. 4.

As to *foreign law*, see also section 38, *ante*, p. 232. In connection with the same subject may be considered the provisions of 22 & 23 Vict. cap. 63; and 24 Vict. cap. 11. The Preamble to the former Statute recites that great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. Section 1 then enacts that if in any action[a] depending in any Court within Her Majesty's dominions, it shall be, in the opinion of such Court, necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions *on any point on which the law of such other part is different* from that in which the Court is situate, it shall be competent to the Court to *direct a case to be prepared* setting forth the facts, as they may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved by such Court or a Judge thereof, they *shall settle the questions of law arising out of the same on which they desire to have the opinion* of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, *being one of the superior Courts thereof*, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act. The parties may petition the Court, whose opinion is to be obtained, to hear them or their counsel; and the Court shall, if it see fit, appoint an early day for hearing them, and shall pronounce its opinion. A copy of the opinion so pronounced, certified by an officer of the Court, shall be given to each of the parties (section 2), who may lodge the same with an officer of the Court in which the action may be depending, with a notice of motion that such party will on a certain day move the Court to apply such opinion to the facts set forth in the case, and the Court shall thereupon apply such opinion to such facts in the same manner as if it had been pronounced by the Court itself upon a case reserved for its opinion; or the Court may, if it think fit, order the opinion to be submitted to the jury with the other facts of the case, as evidence, or conclusive evidence, as it may think fit, of the foreign law therein stated (section 3).[1]

22 & 23 Vict. cap. 63, A.D. 1859.

The Preamble to the 24 Vict. cap. 11, referring to the above Statute, recites that it is expedient to afford the like facilities for the better ascertainment, in similar

24 Vict. cap. 11, A.D. 1861.

[a] 'Action' is defined by section 5 to include every judicial proceeding instituted in any Court—Civil, Criminal, or Ecclesiastical.

[1] As an example of a case in which the provisions of this Statute were resorted to, see *Login* v. *Princess Victoria Gouramma of Coorg*, 1 Jur. O. S. 109. The Court of Chancery in England here forwarded a case on Hindu Law to the Supreme Court at Calcutta.

circumstances, of the law of any *foreign country or State with the Government of which Her Majesty may be pleased to enter into a convention* for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State. Section 1 then makes provisions similar to those above-mentioned, empowering superior Courts within Her Majesty's dominions, in any action depending in them, to remit a case with queries to such superior Court in such foreign State or country as shall be agreed upon in the convention. The provisions as to obtaining a copy of the opinion delivered by the foreign Court, and moving the Court in which the case is depending to apply it, are similar to those already noticed. Then follows a proviso (section 2) empowering the latter Court, if it be satisfied that the facts were not properly understood by the foreign Court, or if it be doubtful on any ground whether the opinion does correctly represent the foreign law as regards the facts to which it is to be applied, to remit the case with or without alterations or amendments to the same or to any other such superior Court in such foreign State as aforesaid. Section 3 empowers *any Court* of a foreign country or State, with whose Government Her Majesty shall have entered into a convention, to remit to the Court in Her Majesty's dominion, whose opinion is desired, a case setting forth the facts and the question of law arising out of the same, and directs such Court to proceed to pronounce an opinion and to give a certified copy thereof to the parties in manner similar to that provided for by the above Statute first mentioned. It may be observed that, under the provisions of the 22 & 23 Vict. cap. 63, any Court, superior or inferior, may obtain the opinion on a question of law of a superior Court in another portion of Her Majesty's dominions; whereas under the 24 Vict. cap. 11, it is only a superior Court in Her Majesty's dominions which can obtain the opinion of a foreign Court, while it appears that any foreign Court, superior or inferior, can obtain the opinion of a Court, superior or inferior, in Her Majesty's dominions.

With reference to experts in science, art, or handwriting, Mr. Taylor says:—"It may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance: in other words, when it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature. On the other hand, it seems equally clear that the opinions of skilled witnesses cannot be received when the enquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it. Therefore, witnesses are not permitted to state their *views on matters of moral or legal obligation*, or on the manner in which other persons would

What is a science or art?

probably have been influenced had the parties acted in one way rather than another. The opinions of scientific witnesses are admissible in evidence not only where they rest on the personal observations of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* on the trial. But here the witness cannot, in strictness, be asked his opinion respecting the very point which the jury" (or in India the Court) "are to determine. For instance, if the question be whether a particular act for which a prisoner is tried were an act of insanity, a medical man conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; *because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.*"[2] He may, however, be asked what judgment he can form on the subject, *assuming the facts stated in evidence to be true* (*Raghuni Singh* v. *Empress*, I. L. R. 9 Calc. 455: 11 C. L. R. 569).[3] In *Queen-Empress* v. *Meher Ali Mallik*, I. L. R. 15 Calc. 589, it was decided that a medical man who had not seen a corpse which had been subjected to a *post mortem* examination could give his opinion as to the cause of death as an expert. In this case the appearance of the body as described by the medical officer who had made the *post-mortem* examination together with the signs spoken to by him as having been noticed by him when making the examination were put to the witness, and he was asked "upon these facts what in your opinion would be the cause of death?" It was held that this question could be put.

Evidence of experts to be received with caution.

The evidence of *experts* is to be received with considerable caution, not because they have been found by experience to wilfully misrepresent what they think, but because their judgments become to a certain extent warped from regarding the subject in one point of view, so that, though most conscientiously disposed, they are incapable of expressing a correct opinion. "They come," said Lord Campbell, "with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[4] As to the opinion of experts see also the first proviso to section 60, *post*.

[2] §§ 1275, 1276, and 1278; 1418, 1419, and 1421, 8th edn.

[3] In America it has been determined, upon grave consideration, and in conformity with the doctrine which has always prevailed in the English Ecclesiastical Courts, that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose not only to particular facts, but to his *opinion* or belief as to the sanity of the party formed from such actual observation. And so also the subscribing witnesses to a will may give their opinion as to the sanity of the testator (see Taylor, § 1273, § 1416, 8th edn., and cases there cited). This evidence does not seem to be admissible under the Indian Evidence Act, which allows the *opinions* of *experts only* on such a point. Of course, any witness may speak to *facts*, from which the Court may form its own opinion as to sanity or insanity (see section 14, *ante*, p. 117.)

[4] *Tracy Peerage* case, 10 Clark and Finnelly's Rep. 191.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

This section is in accordance with the rule of English law, see Taylor on Evidence, § 316; § 337, 8th edn. It is somewhat analogous to section 11, *ante*, p. 98. Illustration (*b*) is taken from the case of *Folkes* v. *Chadd*, 3 Douglas' Rep. 157.

Opinion as to handwriting, when relevant.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's

broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Five methods of proving handwriting.

There are five methods of proving handwriting:—(1) The simplest method is to call the *writer* himself. It is not, however, absolutely necessary to call the writer; a the testimony of any one who saw him write is, equally with his, primary evidence of the fact. (2) Any person who *actually saw the paper or signature written* may be called to prove it. (3) A witness may be called who has obtained a knowledge of, and acquaintance with, the person's handwriting in question by seeing that person write on other occasions. (4) The handwriting may be proved by the evidence of a witness who has acquired a knowledge thereof by having seen *in the ordinary course of business* documents proved, or which may be reasonably presumed, to have been written by the person, whose handwriting forms the subject of inquiry (see *Explanation* and *Illustration*). In the *Fitzwalter Peerage* case[5] it was decided that the evidence of a witness, who had acquired his knowledge of the handwriting not from *a course of business* but from studying the signatures attached to documents admitted or proved to be genuine, but *not produced*, for the express purpose of speaking to the *identity of the writer*,[6] could not be admitted. But when the family solicitor was called and stated that he had acquired a knowledge of the handwriting from having had occasion at different times to examine, *in the course of business*, many deeds and other instruments written or signed by the same ancestor, this was held to be good evidence. (5) Handwriting may be proved by comparison of two or more writings, as to which see section 73, *post*, and as to comparison by experts, section 45, *ante*, and Illustration (*c*) thereto.

The methods of proving handwriting are valuable probably in the order in which they have been placed above. Where a less valuable method of proof is resorted to, it should be borne in mind that this may raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature, if it does not appear that such evidence is not readily available.

Opinion as to existence of right or custom when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

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[5] 10 Clark and Finnelly's Rep. 193.

[6] Which is different from the *identity* of *handwriting* (see section 45, *ante*); the writings to be compared being before the Court (see Illustration (*c*) *id.*)

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Under clause 4, section 32 (*ante*, pp. 167, 185—188), evidence may be given of a *statement, written or verbal*, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court to be unreasonable, *such statement giving the opinion* of such person as to the existence of any *public right or custom or matter of public or general interest*, of the existence of which, if it existed, he would have been likely to be aware, and having been made *before any controversy* as to such right, custom, or matter arose.

The present section (48) is concerned with oral evidence given in open Court by the person expressing the opinion, and is not governed by the limitation "before any controversy, &c." Having advertence to the meaning attached to the terms '*public*' and '*general*,' as explained *ante*, p. 186, the *Explanation* adopts the sense in which the term '*general*' is used by the English writers. The Indian Evidence Act, however, makes no express provision for the admission of oral evidence expressing the opinion, as to the existence of a *public custom or right*, of persons who would be likely to know of its existence, if it existed. Why oral evidence of opinion should be admitted in the case of a *general, though not of a public, custom or right*, is not very obvious. It may perhaps be said that every public custom or right is a general custom or right, though the converse of this proposition would not hold good. It may be observed that the Act declares judgments, orders, or decrees to be relevant when they relate to *matters of a public nature* (section 42), but that there is no provision for admitting them as evidence of *matters of general interest*. See also as to *custom, right*, &c., section 13, *ante*, p. 99; and clause 7, section 32, *ante*, p. 167. *Wajib-ul arz* or village papers made in pursuance of Regulation VII of 1822 regularly entered and kept in the office of the Collector and authenticated by the signature of the officers who made them are admissible in evidence under this section in order to prove a family custom of inheritance stated therein, as the record of opinions as to the existence of such custom by persons likely to know it: *Lekhraj Kuar* v. *Mahpal Singh*; L. R. 7 I. A. 63: I. L. R. 5 Calc. 744. But see *ante*, pp. 109, 110.

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

As to family custom, see *ante*, pp. 112—114.

As to religious or charitable foundations, see Bengal Regulation XIX of 1810; Madras Regulation VII of 1817; Act XX of 1863; Act VII (Bom. C.) of 1865; and the cases cited in the note at foot of pp. 114, 115, *ante*.

The portion of the section which relates to the *meaning of words or terms* is particularly valuable in a country like India, in which there are so many different languages, and in which justice is largely administered by Englishmen in languages other than English. A Judge may also consult a dictionary as to the meaning of a word. See the penultimate para. of section 57, *post*.

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code.

Illustrations.

(*a*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(*b*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant.

The Indian Divorce Act is Act IV of 1869.

The provisions of this section are in accordance with English law, see Taylor, §§ 517, 584, §§ 579, 649, 8th edn., and the cases there cited. See also section 8, *ante*, p. 92: and the observations as to family conduct at p. 192.

The presumption of Muhammadan law is so strong in favor of legitimacy that very little evidence of a child being treated as a legitimate child will suffice to prove legitimacy. See the cases cited, *ante*, at p. 161.

In accordance with the latter part of the proviso to this section it has been held that in cases of adultery and enticing away a married woman, the marriage must be strictly proved: *Empress* v. *Pitambhar Singh*, I. L. R. 5 Calc. 566: 5 C. L. R. 597: *Empress* v. *Arshed Ali*, 13 C. L. R. 125, and *Empress* v. *Kallu*, I. L. R. 5 All. 233. See *ante*, p. 197

Grounds of opinion, when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

The correctness of the opinion or otherwise can better be estimated in many instances when the grounds upon which it is based are known. In *Stephenson* v. *The River Tyne Improvement Commissioners* (17 (English) W. R. 590), it was held that a skilled witness may not only say that he formed an opinion but that he *acted on that opinion*, his acting thereon being a strong corroboration of the truth of the opinion. What a person does is usually better evidence of his opinion than what he says. This evidence would doubtless be admissible under section 8, or under section 11, *ante*.

CHARACTER WHEN RELEVANT.

In civil cases character to prove conduct imputed, irrelevant.

52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

"As evidence of general character can, at best, afford only a glimmering light, when the question is whether the party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings, in which it was originally received *in favorem vitæ*.[7] . . . . . A distinction has, however, been taken between cases where particular acts of misconduct are imputed to a party, and those where his *general conduct is put in issue* and though evidence of character is rejected in the former, it has several times been admitted in the latter class of cases. Thus, in an action for a libel contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and

[7] "In favor of life."

her not being lady-like or good tempered," general evidence was given of her competency, good temper, and manners, by witnesses who were her personal friends; and on the same principle, where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness with whom she had formerly lived was allowed to testify to her antecedent good conduct."[8] "Let a man think," says Blair, "what multitudes of those among whom he dwells are totally ignorant of his name and character; how many imagine themselves too much occupied with their own wants and pursuits to pay him the least attention." And even among those intimate relations who know a man the best, how very few are really acquainted with his inner mind and disposition. It is, therefore, truly but a glimmering light that can be thrown by such evidence upon the probability or improbability of a man's having done a particular act.[9]

In criminal cases previous good character relevant.

53. In criminal proceedings the fact that the person accused is of good character is relevant.

Evidence of good character for the defence may be given either by cross-examining the witnesses for the prosecution, or by calling witnesses on behalf of the accused. As to these latter, see section 140, *post*. The above section is in conformity with English law. "Though general evidence of bad character," says Sir J. Stephen, "is not admitted against the prisoner, general evidence of good character is always admitted in his favor. This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. A loses his watch; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well established inhabitant of the town say, for instance, to the Rector of the parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly proved, except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt,[1] evidence of character is highly important. This always seems

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[8] Taylor, §§ 328, 329; §§ 354, 355, 8th edn.

[9] Clause 2 of section 11 would have admitted this evidence in civil cases, but for the excluding provisions of section 52.

[1] "When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this event alone will the jury be advised to act upon such evidence." Taylor, § 326; § 351, 8th edn.

to me to be equivalent to saying, 'If you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather the more readily because of it.' Evidence of character would thus be superfluous in every case. *The true distinction is, that evidence of character may explain conduct, but cannot alter facts.*"[2] Where the act done is in itself indifferent, or, in other words, where the act amounts to an offence only by reason of being done with a *vicious intention*, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand, the intention is of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act.

Previous bad character not relevant, except in reply.

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

This section has been substituted by section 6, Act III of 1891, for section 54, of Act I of 1872, which, as originally framed, ran as follows:—

"In criminal proceedings, the fact that the accused person has been previously convicted of any offence, is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue."

The rule of English law on this point is, that general evidence of bad character cannot, in the first instance, be given for the prosecution and against a prisoner[3], and this has been followed in India, even before the enactment of The Evidence Act (*Queen* v. *Bihari Dosadh*, 7 W. R. Cr. 7: *Queen* v. *Gopal Thakur*, 6 W. R. Cr. 72: *Queen* v. *Phulchand*, 8 W. R. Cr. 11). "A man's general bad character," says Sir J. Stephen, "is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people; whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only

[2] *General View of the Criminal Law of England*, pp. 311, 312.

[3] To the general rule of English law above stated there is a recent exception, 32 & 33 Vict. ("The Habitual Criminals Act") cap. 99, section 11, which allows such evidence in order to prove guilty knowledge in case of receiving stolen goods.

to one or two persons. If general bad character is too remote, *à fortiori*, the particular transactions of which that general bad character is the effect are still further removed from proof; accordingly it is an inflexible rule of English criminal law to exclude evidence of such transactions."[4] When, however, with a view of raising a presumption of innocence, witnesses to good character are called for the defence, the prosecution may rebut this presumption either by cross-examining these witnesses (section 140, *post*) as to particular facts or as to the grounds of their belief, or by calling separate witnesses of bad character. The latter course is, in practice, seldom resorted to in England, and on one occasion such evidence was rejected.[5] The Legislature, however, in framing section 54 as it originally stood, as pointed out in *Queen-Empress* v. *Kartik Chandra Das* (I. L. R. 14 Calc. 721), deliberately departed from the rule of English law for the express purpose of prejudicing the prisoner. "We include under the word 'character,'" it was said in the first report of the Select Committee on The Evidence Act, "both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence, if it is true." Notwithstanding the provisions of the section, the Calcutta High Court, in *Roshan Dosadh* v. *Empress*, I. L. R. 5 Calc. 768, followed the rule of English law and held that, except under exceptional circumstances, the proper object of using convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged. (See also *Reg.* v. *Parbhudas Ambaram*, 11 Bom. H. C. 90). In the case of *Queen-Empress* v. *Kartik Chandra Das*, I. L. R. 14 Calc. 721, the question was fully considered by a Full Bench, and the Court felt themselves constrained to give effect to the intentions of the Legislature and to hold that a previous conviction is in all cases admissible in evidence against an accused person. In consequence of this decision, the Legislative Council passed Act III of 1891 amending this section, and now a previous conviction is not admissible in evidence against an accused person, except in cases in which the accused is liable to enhanced punishment on account of having been previously convicted, or unless evidence of good character be given, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character.

Under the provisions of section 310 of the Criminal Procedure Code of 1882 the part of the charge stating the previous conviction is not to be read out in Court, and the accused is not to be asked to plead to it, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence. If he pleads guilty to, or is convicted of, the subsequent offence, he shall be asked whether he has been previously convicted as alleged in the charge. To this section (*i.e.*, section 310, C. P. C.) the following clause was added by section 9, Act III of 1891. "Notwithstanding anything in this section, evidence of the previous conviction may be given at the trial for the

[4] *General View of the Criminal Law of England*, pp. 309—310.
[5] *Reg.* v. *Burt*, 5 Cox's Criminal Cases, 284.

subsequent offence, if the fact of the previous conviction is relevant under the provisions of The Indian Evidence Act, 1872."

In connection with this subject the following clause of section 221 of the Code of Criminal Procedure, Act X of 1882, should be borne in mind :—

Previous conviction to be set out in charge.

"If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction *for the purpose of affecting the punishment* which the Court is competent to award, the fact date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed."

These provisions should be read in connection with section 75 of Indian Penal Code, which enacts that "Whoever, having been convicted an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life or to imprisonment of either description for a term which may extend to ten years." And in connection with sections 3 and 4 of The Whipping Act, VI of 1864, which provide for the punishment of whipping *in lieu of* or *in addition to* other punishment on the occasion of a second conviction for one of certain specific offences.

In connection with Native Courts-Martial, to which The Evidence Act is applicable (note to section 1), see Article 117, Act V of 1869 (The Indian Articles of War), which relates to the reception of evidence of previous convictions and general character of persons convicted by a Court-Martial of a military offence.

Explanation 1 may be read in connection with Chapter VIII (sections 109—119) of the Code of Criminal Procedure, Act X of 1882; under which persons of known bad or dangerous character in the Mufassil may be called upon to give security for good behaviour, and, in default thereof, may be imprisoned.

As to the mode of proving previous convictions, see section 511 of the Code of Criminal Procedure.

The Act, as originally drafted, contained the following additional section dealing with the subject of character :—

Character for chastity in trials for rape.

"In trials for rape, or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute, or that her conduct was generally unchaste, is relevant."

It was, however, thought unnecessary to retain this as a separate section, and it was accordingly incorporated with section 155, *post*—see clause 4 thereof.

Character as affecting damages.

55. In civil cases the fact that the character of any person is such as to effect the amount of damages which he ought to receive is relevant.

Explanation.—In sections 52, 53, 54 and 55, the word 'character' includes both reputation and disposition; but [except as provided in section 54][6] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Where a husband sues for damages on the ground of adultery, or a father on the ground of seduction, compensation is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness. The damages should, therefore, be commensurate with this pain, which must vary according as the character of wife or daughter had been previously unblemished or otherwise. In such cases, under English law, evidence not only of *general* bad character, but also of *particular* acts of immorality is admissible. The above section would, however, appear not to contemplate cases of this kind, inasmuch as the person whose character is in question is therein assumed to be the same as the person who claims damages. This evidence may, however, be admissible under section 12, *ante*. The same remarks apply to evidence called by the defendant, in an action by a husband for damages for alleged adultery with his wife, to show that the husband had neglected his wife, turned her out of doors, refused to maintain her, had himself been guilty of dissolute conduct, &c.

Some cases under English law.

The following are some of the questions which have been raised in England on the principle with which the section now under discussion is concerned. There has been considerable doubt whether, in an action for defamation, evidence can be admitted to impeach the plaintiff's previous general character, and to show that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant. Mr. Taylor discusses the question (§ 333; §§ 359, 360, 8th edn.) and arrives at the conclusion that the weight of authority inclines slightly in favor of the admissibility of this evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea.[7] He points out that the arguments against admissibility mainly turn upon proving *particular acts of misconduct*, and that they have little force where evidence is offered merely of *general reputation*. The above section of The Indian Evidence Act is in accordance with this view. In actions for breach of promise of marriage it has never been doubted but that the defendant may show, in mitigation of damages, that the plaintiff is a person of bad character. In an action for damages for malicious prosecution, Lord Kenyon allowed a witness to be asked, with a view of showing probable cause, whether the plaintiff was not a man of notoriously bad character. In an action for defamation, it has always been held that a plaintiff cannot,

[6] The words and figures in brackets were inserted by section 7, Act III of 1891.

[7] But see *Thompson* v. *Nye*, 17 Adolphus and Ellis' Rep. 175; 15 Jur. 285.

in the first instance, give general evidence of good character in aggravation of damages, the presumption of law being already in his favor: but he may give such evidence to rebut evidence of the contrary offered by the defendant. It may be that this rule will be affected by the above section.

With reference to the *Explanation*, 'reputation' signifies what is thought of a person by others, and is constituted by public opinion.[8] 'Disposition' comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind.[9] Both reputation and disposition lie in the general habit of the man rather than in particular acts or manifestations *Evidence may be given only of general reputation and general disposition.* The proper form of question to the witness is—"From your knowledge of the plaintiff or prisoner," as it may be, "does he bear a good character for honesty, &c.?" "From your knowledge of his general character, do you think, &c.?"

Weight of evidence distinct from admissibility.

With this section ends that portion of the Act which is concerned with the *Relevancy of Facts.* The draft Bill prepared by the Commissioners (see *ante*, p. 23) contained the following section:—"When any fact is herein declared to be relevant, it is not intended to indicate in any way the weight, if any, which the Court shall attach to it, this being a matter solely for the discretion of the Court." It was not thought necessary to retain this express provision in the new Act, but the principle expressed therein should none the less be borne in mind. The question of the admissibility or relevancy of evidence is wholly distinct from the weight which is to be assigned to it when admitted.

English text-writers treat of the principles which govern the production of evidence under the four following rules, *viz.*:—

Principles governing production of evidence.

1st.—The evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved.

2nd.—The evidence must be confined to the points in issue.

3rd.—The burden of proof lies on the party holding the substantial affirmative.

4th.—The best evidence must be given.

The *second* of these rules corresponds with Part I of the Act, which treats of the *Relevancy of Facts.* The *third* will be found comprised in the provisions of Chapter VII, Part III, *post.* The *fourth* forms the substance of Chapters IV and V, Part II, *post.* The *first* has not, however, been incorporated with the Act, no doubt because it was considered to be a rule of

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[8] See *Crabb's Synonyms*: "It is possible for a man to have a fair *reputation* who has not in reality a good *character*; although men of really good *character* are not likely to have a bad *reputation*."

[9] "*Disposition* respects the whole frame and texture of the mind; *temper* respects only the bias or tone of the feelings. *Disposition* is permanent and settled; *temper* may be transitory and fluctuating. The *disposition* comprehends the springs and motives of actions; the *temper* influences the action of the moment. It is possible and not unfrequent to have a good *disposition* with a bad *temper*, and *vice versâ*."—*Idem.*

Procedure rather than of *Evidence*. As, however, most writers on the subject of *Evidence* give this rule a place in their treatises, it will not be inconsistent with the design of this work to say a few words as to its meaning and application, more especially as the neglect of this particular rule in India has on more than one occasion formed the subject of comment by the highest Courts of Appeal.

Decision must be *secundum allegata et probata.*

Mr. Taylor, speaking with reference to the state of the law on this point in England, says as follows :—"The pleadings at Common Law are composed of the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the *issues*. If these are propositions of fact, they must, as a general rule, be tried by the jury, and the first rule which it is important to remember is the above [1] As one of the main objects of pleading is to apprize the parties of the specific nature of the question to be tried, and as this object would be defeated if either party were at liberty *to prove facts essentially different from those which he has stated on the record, as constituting his claim or charge on the one hand or his defence on the other*, the necessity of establishing such a general rule as the present becomes apparent, and the only remaining question concerns its limitation and extent." "It is not only necessary," says Mr. Macpherson, "that the substance of the case set up by a party should be proved ; it must be essentially the same case, and not a different case. for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself, is different from that which was set up. There must be a direct and real conformity, though not perhaps a minute literal conformity between the proofs and the allegations : parties who come for the execution of agreements must state them as they ought to be stated : and not set up titles which they cannot support. Thus a party should not set up a general title, such as inheritance, and then seek to recover under a particular deed merely.

. . . . . When a man advances one set of claims and establishes another, Judges are very often tempted to take irregular courses for the purposes of saving further litigation. But it is reasonable and just that the rights of parties litigating should be decided *secundum allegata et probata* (according to what is averred and proved); and it has been well observed, that attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and administering justice, generally lead in the particular cases to results which were never contemplated, and introduce disorder, uncertainty, and confusion into the general practice of the Court."[2]

[1] *i.e.*, "the evidence must correspond with the allegations, but the substance only of the issues need be proved."

[2] *Civil Procedure*, 4th edition, pp. 219—220 ; and see *Saroda Sundari Debi* v. *Gobind Mani* alias *Brajo Sundari Debi*, 24 W. R. 179, where a Judge was held to have been in error in giving an appellant more than she claimed in her petition of appeal. As to whether a plaintiff suing for possession and mesne profits can, when the mesne profits are left to be settled in the execution-proceedings, have a larger amount than he claimed in his plaint—see *Karu Lal Thakur* v. *Forbes*, 7 W. R. 140 : *Haro Gobind Bhakat*

In the case of *Srimati Dasi* v. *Lalan Mani* (12 Moo. I. A. 475), the Judicial Committee of the Privy Council said :—" Their Lordships cannot but feel that it would be most mischievous to permit parties, who had had their case upon one view of it fairly tried, to come before this Board and to seek to have the appeal determined upon grounds which have never been considered or taken, or tried in the Court below." In the case of *Eshan Chandra Singh* v. *Shamacharan Bhatta* (11 Moo. I. A. 20 6 W. R. P. C. 576), the following observations were made :—" This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded *upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.* Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid not only of allegation, but also of evidence in support of it. The case made by the plaintiff alleges a distinct agreement between the plaintiff and two brothers—Kailass and Eshan—that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease, which was put up by a zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Kailass* on his own behalf and on behalf of *Eshan* and on behalf of the plaintiff, and that, in conformity with the agreement between the three, *Kailass* subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Kailass* having no interest and acting in the transaction as agent only of Eshan. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between *Kailass* and *Eshan* of principal and agent, and from the alleged fact of Kailass, in the execution of his authority, having given certain rights and interests to the plaintiff without which his principal (Eshan) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of cases is plain. . . . . These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment. . . . . It is impossible to conclude parties by inferences of fact

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v. *Digambari Debi*, 9 W. R. 217 . *Lachmikant Das* v. *Din Dyal Das*, 14 W.R. 82 : *Guru Das Rai* v. *Banshi Dhar Sen*, 15 W. R. 61 : *Piari Sundari Dasi* v. *Ishan Chandra Basu*, 16 W. R. 302 : *Babajan Jha* v. *Baijnath Dutt Jha*, I. L. R. 6 Calc. 472 : 7 C. L R. 539 : *Jadu Mani Debi* v. *Mahomed Ali Khan*, I. L. R. 8 Calc. 295 : *Gauri Prasad Kundu* v. *Reily*, I. L. R. 9 Calc. 112 : 12 C. L. R. 41.

which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove. . . . . Their Lordships . . . . . desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."[a] In the case of *Muhammed Zahir Ali Khan* v. *Ratta Koer* (11 Moo. I. A. 473), the following observations were made:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings." In *Nistarini Dasi* v. *Makhan Lall Dutt* (9 B. L. R. 29: 17 W. R. 432), *Couch, C. J.*, remarked that the principles enunciated in the judgments in the last two cases are wholly in accordance with the rule observed in Courts of Equity that, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the plaint. In the case of *Arbuthnot* v. *Betts* (6 B. L. R. 274), the same authority observed as follows:—"The Judge, I think, was wrong in saying that he was bound to try the suit in the manner in which the plaintiffs framed their plaint. The object of the plaint is to bring the matter in dispute between the parties before the Court; but, upon the settlement of issues, the Judge is to ascertain what is the real question to be tried: and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question, he ought to do so. . . . . I think that the Procedure Code does not prescribe or even encourage parties to do anything more than state broadly and simply the facts upon which they rely and the relief which they ask for. The Procedure Code, it appears to me, does not limit the parties to particular forms of action; and, provided that the facts upon which the plaintiffs rely are fully disclosed in the plaint and written statement, it rests entirely upon the Court to attach the legal consequences to those facts, and award to the plaintiffs the relief to which those facts entitle them." The facts may not be sufficiently stated in the plaint, in which case it is the duty of the Court, when fixing the issues, to elicit all that is necessary to raise the real questions in dispute between the parties[b];

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[a] See these remarks quoted and applied in *Jawaanissa Saludai Khandan* v. *Jhaman Lall Misser*, 23 W. R. 159: *Chora Kara* v. *Isubin Khalifa*, I. L. R. 1 Bom. 209: *Ram Doyal Khan* v. *Ajudhia Khan*, I. L. R. 2 Calc. 15, and *Mukhoda Sundari Dasi* v. *Ram Charan Karmokar*, I. L. R. 8 Calc. 871.

[b] Section 146 of the Code of Civil Procedure provides that, "at the first hearing of the suit, the Court shall, after reading the plaint and the

or the plaintiff, while setting out the real facts may not exactly conceive or ask for the particular remedy which is available upon those facts, in which case the Court should not deny him any remedy at all because he has not specially asked for the remedy which he can have. But either of those cases is very different from setting up in a later stage of the proceedings a wholly different state of facts, and thus shifting the case of action. In the language of their Lordships of the Privy Council, *the state of facts and the equities and ground of relief originally alleged and pleaded must not be departed from.* This principle may well be illustrated by a few examples. In *Amirunissa Khatún* v. *Aliunissa Khatun* (L. R. 2 I. A. 87), a Muhammadan father and mother had made a gift of certain property to their infant son. Subsequently this son was said to have executed an *ikrar* to his father, making his probable brothers and sisters co-heirs in some of this property, and another similar *ikrar* to his mother in respect of the portion given by her. On attaining majority, he was said to have executed a third *ikrar*, confirming the two previous *ikrars*. He afterwards brought a suit to set aside these three *ikrars* as forged, and to obtain possession with mesne profits of the property which had formed the subject of the gift. The two earlier *ikrars* were found to be genuine, and the Privy Council held that the Appellate High Court was in error in declining to give effect to them on the ground that they were executed by an infant and under undue influence; when neither the plaint nor the issues had directly raised these points, and when no evidence had been taken relating thereto. See also *Browne* v. *M'Clintock* (L. R. 6 H. L. 434). When a plaintiff seeks to establish a specific title based upon specific grounds, as, for example, a *mukarrari patta* or the like, and fails to prove this title, he cannot be allowed to succeed merely because he appears to have been more than twelve years in possession, the question of a title based upon twelve years' adverse possession not having been raised either in the plaint or in the issues (*Bijaya Debya* v. *Bardonath Deb*, 24 W. R. 444; *Shiro Kumari Debi* v. *Gobind Shaw Tanti*, I. L. R. 2 Calc. 418: *Krishna Charan Baisakh* v. *Pratap Chandra Sarma*, I. L. R. 7 Calc. 60: *Jaitara Dasi* v. *Mahomed Mabarak*, I. L. R. 8 Calc. 975: 11 C. L. R. 399). So, where a plaintiff, alleging a *maurasi mukarrari* title, sued to recover possession of land with mesne profits and failed to prove this title, it was held that he could not have a decree on the basis of a right of occupancy, this right not having been set up by him as a ground of relief (*Brindaban Chandra Sirkar* v. *Dhananjai Nashkar*, I. L. R. 5 Calc. 246). From these cases may be distinguished *Ram Lochan Chakravartti* v. *Ram Sunder Chakravartti* (20 W. R. 104), in which the plaintiff *being in possession* asked for a declaration of his title over which a cloud had been cast by a spurious *kabuliyat*. He had been admittedly more than twelve years in possession;

written statements, if any, and *after such examination* of the *parties as may appear necessary*, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend."

and though he failed to prove the particular title alleged by him, he was held to be under the circumstances entitled to the declaration which he asked. A man may of course have two strings to his bow, as was observed in *Davison* v. *Gent* (3 Jur. N. S. 242): he may set up a title in law and a title by possession; and if he fail to prove one title, he may fall back on the other. When a person sued to set aside an alienation by a Hindú widow, alleging that he was her heir, and it was found that he was not her heir, but by a *solehnamah* had acquired all the rights of her heir in the property in suit, it was held that as no objection on this ground had been taken in the Court of First Instance, and as the substance of the case in the plaint was that the sale by the widow was invalid beyond her own interest, the case did not come within the rule laid down in *Eshan Chandra Singh* v. *Shama Charan Bhattó*: *Nurul Hossen* v. *Sheo Sahai Lal*, I. L. R. 20 Calc. 1.

The Land Mortgage Bank sued A, an agent of the Bank, for money entrusted by A to B, alleging that A had no authority to appoint B as a sub-agent. It was found that A had authority. It was held that the Bank could not recover on the ground that A, in appointing B, had not exercised reasonable care and discretion to select a proper person (*Hamilton* v. *The Land Mortgage Bank of India*, I. L. R. 5 All. 456). A Hindú sued to set aside a certain alienation on the ground that the alienor was an illegitimate son of the plaintiff's grandfather, and therefore had no interest in the property. Failing to substantiate this ground in the first Court, he contended in appeal that the alienation was bad, because, under the Mitakshara law, the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. It was held that he could not be allowed to shift his ground in this manner (*Sri Persad* v. *Raj Gúru Triambaknath Deo*, 6 B. L. R. 555).[5] The plaintiffs were second

[5] The following cases will afford further illustrations of the principle:—*Sheo Das Narain Singh* v. *Bhagwan Dutt*, 2 B. L. R. App. 15: *Kali Mohan Chattarji* v. *Kali Krishna Rai Chaudhri*, 2 B. L. R. App. 39 (Here the new point taken manifestly arose out of the facts alleged): *Uma Sundari Dasi* v. *Dwarkanath Rai*, 2 B. L. R. 288: *Jagabandhu Deb* v. *Golak Chandra Haldar*, 10 W. R. 228: *Hira Lal Malik* v. *Matilal Malik*, 5 B. L. R. 682: *Titu* v. *Bilau*, Marsh. Rep. 47 (Suit for money on an *ikrar*: *ikrar* not proved: plaintiff held not entitled to recover): *Verasvami Gramini* v. *Ayyaswami Gramini*, 1 Mad. Rep. 471. *Bisji Bibi* v. *Manohur Das*, 2 Jur. N. S. 118: *Lalji Rattanji* v. *Gangaram Bin Tuljaram*, 2 Bom. Rep. 148: *Madhu Sudhan Goswami* v. *Hills*, 10 W. R. 242: *Athar Hossein* v. *Ramphal Rai*, 20 W. R. 75 (Suit for *patta* corresponding to *kabúliyat* said to have been taken by twelve-anna sharers. Held that, on failure to prove this allegation, a *patta* at a fair and equitable rent could not be given. Plaintiffs came into Court on a special ground, and probably for this very cause there was no evidence upon which the question of a fair and equitable rate could be decided): *Gólab Singh* v. *Kuran Singh*, 10 B. L. R. P. C. 1: *Gopi Lal* v. *Chandraoli Bahuji*, 19 W. R. 12: 11 B. L. R. 391: *Macnaghten* v. *Mahabir Persad Singh*, I. L. R. 9 Calc. 656; given as *Olpherts* v. *Mahabir Persad Singh*, L. R. 10 I. A. 25: 11 C. L. R. 494 (Objection not allowed for first time in Court of appeal): *Terietput Singh* v. *Gosain Sudersun Das*, I. L. R. 4 Calc. 46 (Plaintiff sued for confirmation of possession but was found not to be in possession. But see *Amir Hossein* v. *Imambandi Begam*, 11 C. L. R. 443: *Champa Dai* v. *Uma Dai*, 11 C. L. R. 451): *Satyabhama Dasi* v. *Krishna Chandra Chatarji*, I. L. R. 6 Calc. 55: 6 C. L. R. 375 (Defendant not allowed to plead in Court of Appeal a state of

mortgagees who had foreclosed their mortgagors' equity of redemption, and they sued for possession of the mortgaged property, alleging that the mortgagors' equity of redemption had been finally foreclosed by the first mortgagee (who was their mortgagor) after due proceedings and expiry of the year of grace without redemption; and that they were, therefore, entitled to absolute possession. They failed on the ground that notice of foreclosure had not been duly served; and it was held that they could not obtain a decree as mortgagees for possession, subject to their accounting to the mortgagors, this relief being different from that prayed for in their plaint (*The Bank of Hindustan, China and Japan* v. *Sharoshibala Debi*, I. L. R. 2 Calc. 311). In *Gajapati Radhika* v. *Vasudeva Santa Singaro*, L. R. 19 I. A. 179, the Courts below treated the plaintiff's right to sue as dependent on the issue whether her deceased husband and the defendant's deceased husband, who were brothers, were *sapindas* of each other. The Courts below found that the plaintiff's husband was illegitimate, and therefore not a *sapinda* of his brother, and on this ground dismissed the suit. In appeal to the Privy Council it was urged that the defendant's husband was also illegitimate, and that as the two brothers were equal in point of illegitimacy, they could inherit from one another. But their Lordships of the Privy Council, following *Srimati Dasi* v. *Lalanmani*, refused to allow this contention to be raised in appeal. When a lessor sues to eject his tenant on the expiration of his term or for breach of the conditions of the lease, and fails to prove the lease, he is not at liberty in the same suit to fall back upon his general title (*Lakshmibai* v. *Haribin Ravji*, 9 Bom. H. C. Rep. 1: *Wala Ali* v. *Ghulam Gous*, 10 B. L. R. App. 32). It was remarked in the first of these two cases that, as a general rule, "a party must be limited to the case which he puts forward in his plaint. He may, indeed, from the commencement of the suit, put forward in his plaint an alternative case, and thus the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such order as may to it seem just regarding the adjournment of the hearing and costs. But, as a general rule, a plaintiff must abide by his plaint." The principle here laid down by a Full Bench of the Bombay High Court was approved and followed by a Full Bench of the Calcutta High Court in *Lakhi Kanto Das Chaudhri* v. *Samirudin Laskar* (13 B.L.R. 243: 21 W. R. 208). This was a suit upon a *habúliyat* to recover arrears

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things which he had fraudulently repudiated below, and so change the whole character of his defence): *Land Mortgage Bank, Ld.*, v. *Rai Lachmipat Singh*, 8 C. L. R. 447 (Fraud though not charged in plaint sought to be set up): *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, I. L. R. 6 Bom. 107 (A review asked upon the discovery of fresh evidence to prove a point taken for the first time in second appeal—refused even though applicant was a minor).

of rent. The defendants denied the genuineness of the *kabúliyat*, but at the same time admitted the rate of rent, and pleaded payment. The *kabúliyat* was found to be spurious, but it was contended that the landlord was entitled to have a further inquiry as to whether any rent and how much was due to him on account of the raiyats' use and occupation of the land. In delivering the opinion of the Full Bench, *Couch, C. J.*, said:—"Whether the landlord is entitled to this or not, depends, in our opinion, upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the raiyat has notice that the landlord, if he fails to prove the execution of the *kabúliyat*, will claim rent for the occupation of the land, we think an issue ough to be framed to try whether any rent, and how much, is due on account of the occupation, and the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a *kabúliyat*, and he should not be made to bring two suits when the question between him and the raiyat can be determined in one. But where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due . . . It is in the discretion of the Court to amend the plaint or the issues and allow it to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so—'If by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute' (*Hanúman Persad Panday* v. *Babui Munraj Kúnwari*, 6 Moo. I. A. 411). But where there is reason for thinking that the omission was deliberate, it would generally not be proper."* The case of *Nara Hari Mahant* v. *Naraini Dasi* (W. R. Sp. No. 23; Marsh. 70) was similar. The plaintiff sued for rent upon a *kabúliyat*, which was found to be forgery. The Judge, however, "putting out of all sight the *kabúliyat*," gave a decree for rent at the rate which, after taking further evidence, he held to be proved. This decree was reversed by the High Court on appeal. *Peacock, C. J.*, said:—"We are of opinion that the plaintiff was not entitled to recover. *It is a general rule that a plaintiff must prove his case as laid in his plaint or written statement.* If there is a variance between his statement and his proofs arising from inadvertence or mistake, the Court may allow the issues to be amended, but that is entirely at the discretion of the Court; and we think it would not be the exercise of a sound discretion to allow a party, who relies upon a document, to set up a fresh case when an issue as

* In *Watson & Co.* v. *Dhanendro Chandra Mukharji*, (I. L. R. 3 Calc. 6, the landlord had sued to set aside a *patni* lease. While this suit was pending, he sued for rent for use and occupation, but failed. Having also failed to set aside the lease, he sued thereupon for rent for the years in respect of which he had before sued for use and occupation. It was held that the matter was not *res judicata*, but the claim was barred by limitation.

to the execution of such document is found against him, and there are good grounds for believing that the document is a forgery. Cases have occurred in which parties have attempted to support even a good case by forgery or perjury. If they fail in such attempt, they are very justly punished and are certainly not entitled to any indulgence from the Court. The plaintiff having failed in proving his case as originally stated is not entitled to succeed; and in this case there are no sufficient grounds for allowing an amendment."[1] With these cases compare *Raushan Bibi* v. *Hari Kristo Nath* (I. L. R. 8 Calc. 926), in which an alternative claim for rent at the old rate was held to have been consistent with the plaint and involved in the issues.

But where, in a suit for rent brought on a *kabúliyat*, the raiyat, though denying the *kabúliyat*, admitted a certain amount of rent to be due to the plaintiff, it was held that the plaintiff, even though he failed to prove the *kabúliyat*, was entitled to a decree for the admitted balance (*Rukni Kanth Rai* v. *Sharíhatunnissa Bibi*, 20 W. R. 64: 13 B. L. R. 246, note). This case proceeded wholly on the ground of the admission (see 13 B. L. R. 250, 253). The same principle was applied when the suit was for enhancement, and the defendant, denying the right to enhance, admitted a certain amount of rent to be due for the years which formed the subject of the claim (*Akashbati Koer* v. *Hira Ram Mandar*, 24 W. R. 82). When a zamindar sued to recover enhanced rent in pursuance of a notice of enhancement it was held that, having failed to prove his right to enhance, he could not in that suit recover the rent specified in the *kabúliyat* by which the defendants were bound before the service of the enhancement notice. Their Lordships of the Privy Council were of opinion "that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely on different principles. To a suit for enhancement it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, nor could an issue have been properly raised, in this suit as to whether the rent for 1272 at the rate specified in the *kabúliyat* had been paid or satisfied; nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by *kabuliyat*" (*Surasundari Debí* v. *Ghulam Ali*, 19 W. R. 142: 15 B. L. R. 125, note). See also *Sadarudin Ahmed* v. *Beni Madhab Rai*, I. L. R 15 Calc. 145.

The principle under consideration was, under the old rules of pleading in England, applied with such *pedantic* strictness as to occasion, both in civil and criminal cases, great failures of justice, the least variance even in matters not directly bearing on the issue having been held fatal. But the Legislature interfered and laid down rules of broad justice, which have been universally approved, and the spirit of which has been followed in

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[1] See also *Simru Kariyar* v. *Anand Chandra Rai*, Marsh. Rep. 57; and as to the defence to a suit, *Guru Das* v. *Srishti Dhar De*, 2 R. J. and P. J. 200; also *Umesh Chandra Biswas* v. *Nilkamal Bundopadhya*, *id.* 356.

the preparation of the Indian Codes. *The power of amendment* conferred on the Judges was one of the principal means used for the acquirement of this desirable end. The following are the provisions of the Code of Civil Procedure on this subject: "The plaint may, at the discretion of the Court, (*a*) at or at any time before the settlement of issues[8] be rejected, if it does not disclose a cause of action; (*b*) at or at any time before the settlement of issues be returned for amendment within a time to be fixed by the Court and upon such terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it (*i*) is not signed and verified as hereinbefore required; (*ii*) does not state correctly and without prolixity the several particulars hereinbefore required or contains any particulars other than those so required; (*iii*) is wrongly framed by reason of nonjoinder or misjoinder of parties, or joins causes of action which ought not to be joined in the same suit, or (*iv*) is not framed in accordance with the provisions of section 42; (*c*) at any time before judgment be amended by the Court upon such terms as to payment of costs as the Court thinks fit: Provided that a plaint shall not be amended either by the party to whom it is returned for amendment or by the Court so as to convert a suit of one character into a suit of another and inconsistent character" (section 53).

Powers of amendment under Code of Civil Procedure.

"The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for the purpose of determining *the controversy between the parties* shall be so made or framed. The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced" (section 149).

Power of amending issues.

A mortgagee of the interest of a Hindú co-sharer in immoveable family property sued for possession, and was allowed in appeal to amend by altering his suit so as to make it a suit for partition (*Krishnaji Lakshman Rajvade* v. *Sitaram Murarrav Jakhi*, I. L. R. 5 Bom. 496). A sued to enforce a right of pre emption, alleging that the actual price was less than that entered in the deed of sale, and offering to pay the smaller price which he stated to be the true price. He did not in his plaint express his willingness to pay any amount which the Court might find to be the actual price. It was held that he could not, on the date on which his case was disposed of, be permitted to amend his plaint and bring a larger sum into Court (*Durga Prasad* v. *Nawazish Ali*, I. L. R. 1 All. 591).

Cases illustrating practice as to amendment.

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[8] In *Damodar Madhowji* v. *Purmanandas Jivandas* (I. L. R. 7 Bom. 155), the claim in the plaint as originally framed was based on the alleged invalidity of a will. Leave was refused to amend by inserting a clause that even if the will were valid, it did not dispose of the whole of the testator's property, it being held that the case made by the proposed amendment would be inconsistent with the case made in the plaint as originally framed.

In the case of *Govind Mahapatar* v. *Madhab Persad Pandit* (6 W. R. 211), the scope of section 141 of the old Code, which substantially corresponds with the above section 149, was discussed by the Calcutta High Court; and it was said that the "power of a Court to amend a plaint extends by a *vivâ voce* examination to the elucidation of what is ambiguous, to the amendment of what is erroneous, and to the supplying of what is defective; but not to the conversion of suit of one character into another inconsistent with and opposed to the remedy at first asked for." In the case of *Mahamed Riza u-din* v *Hossein Baksh Khan* (1 W. R. 300), the plaintiff, alleging a contract of partnership which he failed to prove, sought to recover some 3,000 rupees from the defendant. The latter admitted the receipt of money from the plaintiff as a deposit repayable by him, and on this admission the plaintiff was declared entitled to a decree for the balance of the advance still due to him. *Campbell, J.*, remarked as follows:—"I am decidedly of opinion that the object of the new procedure being to do away with strict rules of pleading and technicalities of all kinds, it is not necessary to keep parties very strictly to their written pleas further than the interests of broad justice and morality require; and that it is right that the Judge should simply find the real questions upon which the parties are at issue, and try those questions. Here it was admitted on both sides, that money of the plaintiff's had been received by the defendant, and was repayable to him upon an account. The question between the parties was, whether defendant had agreed to share the profits of his business with plaintiff, and to pay those profits in addition to the money received. I think it is unfair and unnecessary that, because plaintiff has essayed to prove something more than the money count, and has failed to prove that additional claim, he should, therefore, also lose the money which is clearly due to him, or that the parties should be subjected to further unnecessary litigation. Defendant did not in his answer admit anything to be due to the plaintiff, but denied the claim in general terms; and as, on his own version of the contract, a certain sum has been found to be due, I think that the Judge was wrong in refusing to decree that sum in his favour." *Morgan, J.*, said:—"I think the plaintiff should obtain in the present suit a decree for the balance shown by the books, and that this decree will be in due conformity with the previous allegations and the proofs. The verified plaint required by Procedure Code does not preclude the Court from framing an issue, and pronouncing a decree, respecting any matter *fairly within the scope of the plaint, which the written statements or the oral examinations may show to be a part of the real question in controversy* between the parties. In a suit for one cause of action, a totally unconnected transaction should certainly not be investigated, because the suit is brought to determine not *all or any* matters in difference between the parties, but *a certain particular controversy*. There is, perhaps, no substantial difference of opinion as to this rule, but only as to its application to the present case. I cannot regard the balance now ascertained to be due as an unconnected transaction wholly distinct from any cause of action contained in the plaint, and I, therefore, agree with Mr. Justice Campbell that the plaintiff is entitled to recover it in this suit."

Our Code does not contemplate that the plaint shall contain several '*counts*' giving various versions of the contract or title upon which the plaintiff sues, and if we are to hold a plaintiff strictly to the proof of the case alleged in the plaint, and to punish any variance between the contract proved and the contract alleged by dismissal of the suit, we shall, in my opinion, inflict great hardship on suitors, and sometimes punish them for the errors, and perhaps the unavoidable errors, of their advisers." The following cases, decided under the old Code, Act VIII of 1859, may still be consulted upon the subject of amendment :—*The Delhi and London Bank* v. *Miller*, 7 B. L. R. App. 65 (Amendment of plaint by substitution of defendants allowed before written statements were filed by either party): *East India Railway Company* v. *Jordan*, 14 W. R. O. C. 11: 4 B. L. R. O. C 97 (Amendment of plaint by striking out the names of plaintiffs found not to have been partners when the cause of action accrued) : *Rathi Mul* v. *Nannack*, 1 N.-W. P. Rep. 171 (Amendment, but not so as to make a wholly new cause of action): *Joseph* v. *Solano*, 9 B. L. R. 441 · 18 W. R. 424 (Plaint amended and an additional issue framed in appeal . *Couch, C. J.*, said :—" I think we have power to do this, and that it might have been done at the hearing, if the plaintiff had applied for it"): *Proby* v. *Bell*, 20 W. R. 6 : *Ramdayal Khan* v. *Ajudhia Ram Khan*, I. L. R. 2 Calc. 1 (Amendment allowed on appeal ; *Markby, J.*, after quoting the authorities, said :—" I have no doubt . . . that the practice that the Privy Council wish to enforce is not an absolutely rigid adherence to the plaint and written statements (which the Code declares not to be necessary), but that care should be taken to raise properly on the issues, and at the proper time, the questions to be tried, so as to give the parties an opportunity of producing their evidence, and being heard upon the points upon which the decision of the case ultimately turns") : *Bolye Meah* v. *Khetu Gorai*, 20 W. R. 208 (Here, after the case had been heard, an application was made to raise a fresh question as part of the defence ; *Couch, C. J.*, said :—" It was the duty of the Munsif, by the words of the Code of Civil Procedure, at that stage of the suit, if it appeared that the real question between the parties was whether the lease had been granted in such a way as to bind all the shareholders, to have amended the issues so as to determine it. Section 141 says, that, at any time before the decision of the case, the Court may amend the issues or frame additional issues, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made. The Judicial Committee of the Privy Council has said in 6 Moo. I. A. page 393, that it is the duty of the subordinate Courts to constantly bear in mind that they are to decide according to equity and good conscience ; that the substance and merits of a case are to be kept constantly in view ; and that if, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and (if need be) by adjournment, for the decision of the real points in dispute") : *Surjamani Dayi* v. *Sadanand Mahapatar*, 12 B. L. R. 304 : 20 W. R. 377 (Privy Council were of opinion that

a Court had the power, with the consent of the parties, to substitute another form of relief for the relief specially sought): *Nehora Rai* v. *Radha Persad Singh*, I. L. R. 5 Calc. 64 (Judge not bound to amend issues except for the purpose of trying more effectually the real questions in controversy.

Surplusage need not be proved.

In connection with this rule there are one or two other points which may be noticed. And first, *surplusage need not be proved.* The term 'surplusage' is used to signify whatever may be struck out of the record without destroying the right of action or the charge on the one hand, or the defence on the other. For example, in an action on a breach of a warranty that some claret was in a fit state to be exported to India, whereas it was at the time, and *the defendant well knew that it was*, in a very unfit state, it was held unnecessary to prove the words in italics, as the cause of action was complete if the claret was really unfit for exportation, whether the defendant was aware of the unfitness or not. Lord Ellenborough said :—"If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." *Lawrence, J.*, said :—"I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover."

Cumulative allegations are immaterial.

The next point to be noticed is, that *cumulative allegations, or such as merely operate in aggravation, are immaterial*, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. Where the defendant was charged with composing, printing, and publishing a libel, it was held sufficient to prove *publication*. So, on an indictment for *murder*, a prisoner may be convicted of culpable homicide not amounting to murder. On an indictment for killing a sheep with intent to steal the carcass, proof of stealing part of the carcass was held sufficient. In civil actions, where special damage is alleged, it need not be proved, if the words or actions be actionable *per se*. Allegations of *place, time, number*, and *value* are in general immaterial, unless when *of the essence of the offence*, or necessary to give notice to the accused person of the matter with which he is charged—See section 222 of the Code of Criminal Procedure.

Sections 228 to 232 of the Code of Criminal Procedure, Act X of 1882, contain the law of amendment in criminal cases.

PART II.

ON PROOF

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

As to facts admitted, see section 58, *post*.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1) all laws or rules having the force of law now or heretofore in force, or hereafter to be in force in any part of British India :

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :

(3) Articles of War for Her Majesty's Army or Navy :

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto :

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;

(2) the Parliament of Great Britain ;

(3) the Parliament of England ;

(4) the Parliament of Scotland ; and

(5) the Parliament of Ireland.

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the

Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

See *Jakir Ali Chaudhri* v. *Raj Chandra Sen* (10 C. L. R. 469), in which the Court refused to take judicial notice of the seal of a Kazi or Sadr Amin, whose appointment, said to have been made about the year 1820, was not proved.

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government:

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown:

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette:

(10) the territories under the dominion of the British Crown:

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons:

(12) the names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it:

(13) the rule of the road [on land or at sea.[9]]

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

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[9] The words in brackets were added by the amending Act, XVIII of 1872.

If the Court is asked upon by any person to take judicial notice of any fact it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Mr. Whitley Stokes, in his edition of the Act, points out that the list given in this section of the facts of which the Court shall take judicial notice of is far from complete, and observes that "Anglo Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as, in Bengal, lists of land-holders who have not made road cess returns (Beng. Act IX of 1880, s. 19); in Madras, bye-laws framed by the Commissioners of Police (Mad. Act III of 1862, s. 5); in Bombay, notifications in the Gazette (Bom. Act X of 1866, s. 4); in Oudh, the list of talukdars and grantees published by the Chief Commissioner (Act I of 1869, s. 10)." (Stokes' Anglo-Indian Codes II, p. 887.) See also section 431, Act XIV of 1882, which provides that a Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor General in Council.

As to what laws or rules have the force of law in India, see *ante*, pp. 4, 5; and the *Introduction to the Statute Law of India* prefixed to Author's *Chronological Table and Index*.

The following is a brief account of the legislative powers exercised by the Governments in India :—

3 & 4 Wm. IV cap. 85, A.D. 1833.

By the 3 and 4 Wm. IV. cap. 85, sec. 39, the superintendence, direction, and control of the whole Civil and Military government of the British territories and revenues in India became vested in the Governor-General and Councillors, henceforward styled "*the Governor-General of India in Council.*" Under the 43rd section the *Governor-General in Council* was empowered to legislate for all India; and from 1834 the Acts of the "Governor-General of India in Council" were passed for and became law throughout the three Presidencies. Previous to 1834, there were three Legislative bodies, one for each Presidency, *viz.*, the Governor-General in Council of the Presidency of Fort William in Bengal for the Bengal Presidency, the Governor in Council of the Presidency of Fort St. George for the Madras Presidency, and the Governor in Council of the Presidency of Bombay for the Bombay Presidency. The Regulations passed by these Legislative bodies had effect only within their own Presidencies, and formed three separate Codes, dating, respectively, from 1793 in Bengal, from 1802 in Madras, and from 1799 in Bombay. For further information as to details and for the change made in the constitution of the Legislative Council in 1853 by the 16*th and* 17*th* Vict. cap. 95, the reader is referred to the Author's *Introduction* already mentioned.

The Indian Councils Act, 1861.

In 1861, a change was again made in the constitution of the Council of the Governor-General by the 24 and 25 Vict. cap. 67, "*The Indian Councils' Act*, 1861," and power was

once more given to the Governors in Council of the Madras and Bombay Presidencies to make laws and regulations for the government of these Presidencies. Such laws or regulations are not, however, to have validity until the Governor-General shall have assented thereto, and *such assent shall have been signified to and published by the Governor.* The legislative powers conferred by this Act are thus defined and limited:—

"The Governor of each of the said Presidencies in Council shall have "power, at such meetings for the purpose of making laws and regulations "as aforesaid, and subject to the provisions herein contained, to make "laws and regulations for the peace and good government of such Presi-"dency, and for that purpose to repeal and amend any laws and regula-"tions made prior to the coming into operation of this Act by *any author-"ity in India*, so far as they affect such Presidency. Provided always "that such Governor in Council shall not have the power of making any "laws and regulations which shall in any way affect any of the provisions "of this Act, or of any other *Act of Parliament in force, or hereafter to be "in force, in such Presidency.*

"It shall not be lawful for the Governor in Council of either of the "aforesaid Presidencies, except with the sanction of the Governor-General "previously communicated to him, to make regulations or take into con-"sideration any law and regulation for any of the purposes next herein-"after mentioned; that is to say—

1. "Affecting the lands of the Crown, or the public debt of India, or "the public revenue derived from assessment of the land, or the customs "duties, or any other tax or duty now in force and imposed by the author-"ity of the Government of India:

2. "Regulating any of the current coin, or the issue of any bills, notes, "or other paper currency:

3. "Regulating the conveyance of letters by the post-office or messages "by the electric telegraph within the Presidency:

4. "Altering in any way the Penal Code of India as established by "Act of the Governor-General in Council, No. 42,[1] of 1860:

5. "Affecting the religion or religious rites and usages of any class of "Her Majesty's subjects in India:

6. "Affecting the discipline or maintenance of any part of Her Majesty's "Military or Naval Forces:

7. "Regulating patents or copyright:

8. "Affecting the relations of the Government with Foreign Princes or "States."

It was further provided as follows:—

"The Governor-General in Council, so soon as it shall appear to him "expedient, shall, by proclamation, extend the provisions of this Act touch-"ing the making of laws and regulations for the peace and good govern-

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[1] *Sic;* but evidently a mistake for '45.' The Penal Code is Act XLV of 1860.

"ment of the Presidencies of Fort Saint George and Bombay (except as "hereinafter mentioned) *to the Bengal division of the Presidency of Fort "William, and shall specify in such proclamation the period at which such "provision shall take effect*, and the number of Councillors whom the Lieu-"tenant-Governor of the said division may nominate for his assistance in "making laws and regulations; and it shall be further lawful for the Gov-"ernor-General in Council, from time to time and in his discretion, by "similar proclamation, *to extend the same provisions to the territories known "as the North-Western Provinces and the Punjab respectively.*

"It shall be lawful for the Governor-General, by proclamation, as afore-"said, to constitute from time to time new provinces for the purposes of "this Act, to which the like provisions shall be applicable; and, further, "to appoint from time to time a Lieutenant-Governor to any province so "constituted as aforesaid, and from time to time to declare and limit the "extent of the authority of such Lieutenant-Governor, in like manner as "is provided by the Act of the 17th and 18th years of Her Majesty, Chap-"ter 77, respecting the Lieutenant-Governors of Bengal and the North-"Western Provinces."

The provisions of the Act were extended to the Bengal division of the Presidency of Fort William from the 18th January, 1862, by a proclamation which appeared in the *Calcutta Gazette* of Saturday, January 18th, 1862, pp. 227, 228. They have not as yet been extended to any other province.

The restrictions on the legislative powers of the Governor-General are contained in the following proviso:—

Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act: or any of the provisions of the Acts of the 3rd and 4th years of King William IV, Chapter 85, and of the 16th and 17th years of Her Majesty, Chapter 95, and of the 17th and 18th years of Her Majesty, Chapter 77, which after the passing of this Act shall remain in force: or any provisions of the Act of the 21st and 22nd years of Her Majesty, Chapter 106, entitled "an Act for the better government of India:" or of the Act of the 22nd and 23rd years of Her Majesty, Chapter 41, to amend the same: or of any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India: or of the Act for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces, respectively; but subject to the provisions contained in the Act of the 3rd and 4th years of King William IV, Chapter 85, section 73, respecting the Indian Articles of War: *or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof, or the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution* of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to

the Crown of the United Kingdom, or the sovereignty or dominions of the Crown over any part of the said territories."

By 32 and 33 Vict. cap. 98, passed on the 11th August 1869, power was given to the Governor-General in Council to make laws for native Indian subjects without and beyond, as well as within, the Indian territories under the dominion of Her Majesty, and also to repeal or amend sections 81, 82, 83, 84, 85, and 86 of 3 and 4 Wm. IV, cap. 85.

By 33 Vict. cap. 3, section 1, passed on the 25th March, 1870, it is provided that every Governor of a Presidency in Council, Lieutenant Governor, or Chief Commissioner shall have power to propose to the Governor General in Council drafts of any regulations for the peace and government of any part or parts of the territories under his government or administration, and the Governor-General in Council shall take such drafts into consideration; and when any such draft shall have been approved of by the Governor-General in Council, and shall have received the Governor-General's assent, it shall be published in the *Gazette of India* and the local Gazette, and shall thereupon have the force of law.

By 34 and 35 Vict. cap. 34, passed on the 29th June, 1871, power was given to local legislatures to confer jurisdiction over European British subjects on Magistrates in certain cases.

By the 37 and 38 Vict. cap. 91, passed on the 7th August, 1874, and the 55 and 56 Vict. cap. 14 (*The Indian Councils' Act*, 1892), passed on the 20th June, 1892, considerable changes in the constitution of the Governor General's Council have been made. The only section of these Acts dealing with legislative powers is section 5 of the latter Act, which provides that "the local legislature of any province in India may from time to time, by Acts passed under and subject to the provisions of *The Indian Councils' Act*, 1861, and with the previous sanction of the Governor-General, but not otherwise, repeal or amend as to that province any law or regulation made either or before or after the passing of this Act by any authority in India other than that local legislature. Provided that an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor General in pursuance of "*The Indian Councils' Act*, 1861, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this section.

Many Acts contain a section empowering the Local Government to make rules for carrying into effect the provisions of the Act and declaring that such rules, when made and published in the manner provided, shall have the force of law. These rules fall within the purview of this section. See also section 19, Act III (Bom. C.) of 1857, which makes a special provision for rules made under that Act and relating to Military Cantonments.

In *Queen Empress* v. *Ramzan* (I. L. R. 7 All. 461), *Mahmud, J.*, has said that, as by the Bengal Civil Courts Act the Legislature has enacted that the

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[2] The limitations on the power of the Indian Legislature will be found discussed in *Damodhar Gordhan* v. *Deoram Kanji*, L. R. 3 I. A. 102; and *Empress* v. *Burah and Bulk Sing*, I. L. R. 3 Calc. 63.

Muhammadan Law shall be administered with reference to all questions regarding any religious usage or institution (see section 37, Act XII of 1887), a Court is bound by this section [57 (1)] to take judicial cognizance of the Muhammadan Ecclesiastical Law, and the parties are relieved of the necessity of proving that law by specific evidence.

Statutes: public, private, local and personal.

Statutes are either public or private, general or special. The distinction between public and private Acts was first made in the reign of Richard III. *A public* or *general* Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex-officio*, although not formally set forth by a party claiming an advantage under it. But *special* or *private* Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded—which provision is now usually introduced. For convenience of reference, the printed Statute Book of a Parliamentary Session is classified thus:—1. Public General Acts. 2. Local and Personal Acts, declared public and to be judicially noticed. 3. Private Acts, printed by the Queen's printer, and whereof the printed copies may be given in evidence. 4. Private Acts not printed. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein—see 13 and 14 Vict. cap. 21.

Indian Articles of War.

The Articles of War for Native Officers, Soldiers, and other persons in Her Majesty's Indian Army are contained in Act V of 1869.

Seals.

The following are some of the Seals of which English Courts take judicial notice, *viz.*:—the Great Seal: the Queen's Privy Seal: the Seals of the Superior Courts: the Seals of all Courts constituted by Act of Parliament, if Seals are given them by the Act: of the Registries of the Court of Probate: of the County Courts: of the Corporation of London: Seals of Foreign States or British Colonies, see 14 and 15 Vict. cap. 99, section 7: 18 and 19 Vict. cap. 42, section 3; 15 and 16 Vict. cap. 86, section 22; 24 and 25 Vict. cap. 134, section 202 (Bankruptcy Act); and Taylor, §§ 6, 9—11; §§ 6, 10, 12, 13, 8th edn.

Names, Titles, &c., of public officers.

The provisions of clause (7) of this section, which are far in advance of English law, are in accordance with the rule acted upon in America. In England the signatures of the Superior Equity and Common Law Judges, of the Commissioners and Registrars of the Courts of Bankruptcy, and in certain cases of the officers of the Courts of Chancery and Bankruptcy in all proceedings under the winding-up clauses of the Companies' Act, 1862, are *by Statute* judicially noticed. "On the other hand," says Mr. Taylor, "it appears highly probable that the Courts would not recognize the signatures of the Lords of the Treasury to their official letters; and it is even a matter of some doubt whether the Royal Sign Manual would be judicially noticed." See in connection with this clause *Queen* v. *Navadwip Goswami*, 1 B. L. R.

O. Cr. 15, in which it was held that the High Court was bound to take judicial notice that *It* was a Justice of the Peace for Bengal: and *Tamor Sing* v. *Kalidas Rai* (4 B. L. R. O. J. 51), where judicial notice was taken of a jailor's signature under section 16 of the Prisoners' Testimony Act, XV of 1869.

Divisions of time, &c.

Under clause 9 of this section the Bengali, Willaití, Fasli, Sambat or Hindí, Hijrí, and Jalús eras will be judicially noticed in those districts in which they are current, and reference may be made to the usual almanacs, when occasion requires.

By section 25 of the Limitation Act, XV of 1877, all instruments are, for the purposes of that Act, to be deemed to be made with reference to the Gregorian Calendar.

The existing law as to the qualifications and enrolment of Vakils and Mukhtars is contained in "The Legal Practitioners' Act," XVIII of 1879.

Books of reference.

The provision that "the Court may resort for its aid to appropriate books," is in advance of English law, under which, though an expert, called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority, yet the books themselves cannot be cited. Medical works, for example, and, in a case connected with a horse, works on farriery, have been rejected.* As instances of the application of the rule in India, with regard to matters of public history, &c., the following cases may be referred to:—*Issar Ghosh* v. *Hills*, W. R. Sp. No. 48: *Hills* v. *Issar Ghosh*, *id.* 131 and 148: *Thakuráni Dasi* v. *Bisheshar Mukharji*, 3 W. R. Act X, 29: the *Dyce Sambre* case, Indian Jurist of 30th April, 1867: *Queen* v. *Amirudin*, 7 B. L. R. 63: 15 W. R. Cr. 25. In these cases Mill's History of India, Mill's Political Economy, McCulloch's Political Economy, Wilson's History of England, Harington's Analysis, Sanads, Treaties, and other similar works and documents were freely quoted by the Bench and the Bar. In the case of *The Collector of Madura* v. *Mútu Ramalinga Sathupathi* (12 Moo. I. A. 397), sworn translations of Sanscrit works, little known, concerned with Hindú Law, bearing upon the customs in the different schools with respect to the law of adoption, were admitted both in India and England. And reference has been made to a well-known treatise of received authority, such as Taylor's Medical Jurisprudence (*Hatim* v. *Empress*, 12 C. L. R. 86: *Haricharan Chakravatti* v. *Empress*, I. R. 10 Calc. 140). In *Vallabha* v. *Madusudanan*, I. L. R. 12 Mad. 495, the lower Appellate Court had relied on Sangunni Menon's History of Travancore as an authority for some alleged local customs. The Madras High Court, however, observed that this book was not one of the exhibits in the case, and that they did not consider it was regular to rely on the book without calling the attention of the parties to it and warning them as to whether the procedure prescribed therein was an incident of the usage as it obtained in the locality where the cause of action arose. In *Augustine* v. *Medlycott*, I. L. R. 15 Mad. 241, reference to a Portuguese work "India Orientalis Christiana," published

* *Darby* v. *Ousley*, 20 Jurist 497.

in 1794, and "Hough's History of Christianity in India," published in 1839, was approved of.

The last clause of the section is in accordance with *Von Omeron* v. *Dowick*, in which Lord Ellenborough declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the *Gazette* in which it had been published.* In *Reg* v. *Withers* it became a material question to consider how far the prisoner owed obedience to his sergeant, and this depended on the Articles of War, which were not produced at the trial. The Judges were of opinion that they ought to have been produced.* It will be observed that though the Court *may* refuse, it is not imperative that it should refuse. The *Gazettes* are usually supplied to, filed, bound, and preserved in the office of all Courts in India, and, when any matter may be placed beyond doubt by the mere production of the *Gazette*, the Court might properly have it produced from its own record room. Advocates and Pleaders should, however, make a request to this effect in sufficient time to prevent delay at the hearing.

Facts admitted need not be proved

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

As to admissions, more especially in civil proceedings, see *ante*, pp 130, 134, 159 165.

Section 128 of the Code of Civil Procedure (corresponding with section 117 of the Common Law Procedure Act, 1852, 15 and 16 Vict cap 76, and with Order 32, Rule 2 of the present Rules of the Supreme Court under the Judicature Act), enacts as follows —"Either party may, by a notice through the Court, within a reasonable time, *not less than ten days before the hearing*, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit. The admission shall also be made in writing signed by the other party or his pleader, and filed in Court. If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders If such notice is not complied with *within four days* after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit."

* 2 Campbell's Rep. 44.
See *R.* v. *Holt*, 5 Term Rep. 446

In the case of *Talar Sheroo* v. *Begum* (6 Moo. I. A. 521) the Lords of the Privy Council made the following observation: "It is said on the part of the appellant, that that will was not properly in evidence, for although a will was produced (or rather an official copy of a will was produced) there was no examination of witnesses, and though that will had been proved by *Gokul* as to the personal estate that would be no evidence against the appellant at all events it would not affect the real estate. If it would be necessary to decide that question, their Lordships would be inclined to hold that the will was sufficiently in evidence for the purposes of this suit. The Regulation* provides that, where documents are produced, and they are not disputed, they shall be received without proof." In *Nanki Kishor Das Mahant* v. *Ram Kalp Rai* (6 B. L. R. App. 49) these observations were referred to as substantially laying down that the rules which regulate the conduct of cases in the Mufassil Courts do not necessitate the proving of documents which are not disputed. It would appear, however, that their Lordships spoke with especial reference to the state of things antecedent to the operation of the Code of Civil Procedure. Certainly, it would be difficult to reconcile any such general rule with other observations which are to be found in more recent judgments, and which strongly impress the necessity of parties proving by competent evidence the case which they must prove in order to succeed — see *ante* p. 164. Under the existing procedure, there can be no doubt that documents, if not expressly admitted, must be proved (see section 67, *post*). In *Burjorji Cursetji Panthaki* v. *Muncharji Kuverji* (I. L. R. 5 Bom. 145) the defendant, in a suit for specific performance of an agreement, admitted in his written statement the terms of the agreement and its execution, and it was held that the plaintiff was not called upon to prove the execution of the document or put it in evidence.

As to admissions by Vakils, see *ante*, page 90 *note*.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

For instance, the adjustment of an account may be proved by oral evidence (*Purnima Chaudrani* v. *Nityanand Saha*, B. L. R. Sup. Vol. F. B. 3); and the payment of money may be similarly proved, even though there be a written receipt not produced (*Dalip Singh* v. *Durga Prasad*, I. L. R. 1 All. 442. Illustration (*e*), section 91, *post*). Where there is a conflict of oral evidence, the Privy Council have more than once remarked upon the value

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* What Regulation is here referred to, there is nothing in the report to show, but it may be observed that all the old Regulations relating to civil procedure have been repealed by Act X of 1861 and subsequent repealing Acts.

of documentary evidence as a guide to show on which side the truth lies (*Imam Bandi* v. *Hargobind Ghosh*, 4 Moo. I. A. 403 : *Ekauri Singh* v. *Hiralal Sil*, 2 B. L. R. P. C. 8). It may also be observed that when testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented (*Asadúla* v. *Imaman*, 1 Moo. I. A. 43.)

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct ; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it ;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it :

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner ;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

See *ante*, pp. 169, 170.

With reference to this section, *Markby, J.*, in *Nilkanto Pandit* v. *Jaggobandhu Ghosh*, 12 B. L. R. App. 18, has said: "Section 60 provides that when it (*i.e.*, the oral evidence) refers to a fact which could be seen, it (*i.e.*, the oral evidence) must be the evidence of a witness who says he saw it. This last "it" is somewhat indefinite; but I think that this "it" has reference to the "fact" previously spoken of; and I think the fact previously spoken of is the fact deposed to and, therefore, not always the fact which it is ultimately intended to prove. In other words, I do not think that it was

intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning."

Admissions made by a person whose position in relation to the property in dispute it is necessary to prove against a party to a suit are in the nature of original evidence, and not hearsay. They are therefore legal evidence, though the person is alive and has not been cited—*Ali Moidin Ravuthan v. Elaya Chanidathil Kombi Achen*, I. L. R. 5 Mad. 239.

The subject of the admissibility of hearsay evidence in cross-examination, is referred to in *Ganouri Lal Das v. Queen-Emp.*, I. L. R. 16 Calc., pp. 210, 211, 215. This case is, however, no authority for the contention that such evidence is admissible in cross-examination except under the provisions of section 146, *post*.

The first *proviso*, which should be read with sections 45 and 46, *ante*, is an alteration of the rule of English law, which does not admit this evidence. The treatise, in order to be admissible, must be one *commonly offered for sale*. The burden of proving that any particular treatise is commonly offered for sale will be upon the person who desires to give such treatise in evidence (see section 104, *post*).

As to the treatises to which reference has been permitted under this section, see note to section 57, *ante*, p. 377.

With reference to the second *proviso*, see the remarks at pages 87-88, *ante*.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

These are usually known as *duplicate, triplicate, originals*.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

And secondary evidence as against the other parties. See clause 4, section 63, *post*, and Taylor on Evidence, § 396; § 426, 8th edn.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

R. v. *Watson*, 32 Howell's State Trials, 82--86.

Secondary evidence.

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

See *Lachman Singh* v. *Puna*, I. L. R. 16 Calc. 753 · L. R. 16 I. A. 125, and section 76, *post*.

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

Such, for example, as the processes mentioned in Explanation 2, section 62. Read Illustration (*c*) with the latter portion of this clause.

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

It will not be sufficient for the person to have seen a copy. He must have seen the original document (*Kanáya Lal* v. *Pyara Bai*, I. L. R. 7 Bom. 139). See Illustration (*d*).

Illustrations.

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it be shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence: but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or a machine copy of the original, is secondary evidence of the original.

Reading together clause 2 and Illustrations (*b*) and (*c*), it will appear that a *copy of a copy*, *i.e.* a copy transcribed from and compared with a copy, is inadmissible, (see *Ram Prasad* v. *Raghunandan Prasad*, I. L. R. 7 All. 738,) unless the copy with which it was compared were a copy made by some mechanical process which in itself insures the accuracy of such copy. But copies of copies kept in a registration office, when signed and sealed by the registering office, are admissible for the purpose of proving the contents of the originals (section 57, Act III of 1877). The following cases are no longer law so far as they relate to copies:—*Unida Rajaha Bommarauze Bahadur* v. *Premmasamy Venkatadry Naidú*, 7 Moo. I. A. 128: *Ajúdhia Persad Singh* v. *Amrao Singh*, 6 B. L. R. 509: *Tayabanissa* v. *Sham Kishor Rai*, 7 B. L. R. 627: *Makbul Ali* v. *Masnad Bibi*, 3 B. L. R. 54: *Ram Gopal Rai* v. *Gordon Stuart and Co.*, 14 Moo. I. A. 453.

The correctness of certified copies[7] will be presumed under section 79 *post*; but that of other copies will have to be proved. This proof may be afforded by calling a witness, who can swear that he has compared the copy tendered in evidence with the original, or with what some other person read as the contents of the original, and that such copy is correct. It is not necessary for the persons examining to exchange papers and read them alternately both ways.[8] It may seem scarcely necessary to remark that proof of a copy being a *correct copy* is no proof of the *original*, *i.e.* of its execution, genuineness, &c. (*Ram Jadú Gangúli* v. *Lakhi Narain Mandal*, 5 R. C. & C. R. Act X, Rul. 23. See also *Amirannissa Khatún* v. *Abidanissa Khatún*, 23 W. R. 208).

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

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[7] As to the use of a certified copy of a decree or order, made by the Queen in Council upon the recommendation of the Judicial Committee, in proceedings in India for enforcing the same, see section 610 of the Code of Civil Procedure, and *Harish Chandra Chaudhri* v. *Kali Sundari Debi*, L. R. 10 I. A. 15: I. L. R. 9 Calc. 482: 12 C. L. R. 517.

[8] Taylor, § 1389; § 1545, 8th edn.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

(*a*) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it ;

Any secondary evidence is here admissible, see below. An instance of evidence being held to be admissible on this ground will be found in *Lachman Singh* v. *Puna*, I. L. R. 16 Calc. 753 : L. R. 16 I. A. 125.

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

The written admission is the secondary evidence here admissible, see below. As to oral admissions of the contents of a document, see *ante*, section 22.

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

Any secondary evidence is here admissible, see below. When a *registered* deed of sale had been lost, it was held, therefore, that oral evidence of the transaction might be received, and that it was not necessary to insist upon the production of a certified copy from the Registration Office (*Harish Chandra Mallik* v. *Prasanno Kumar Banarji*, 22 W. R. 303). In *Khettro Chandra Mukharji* v. *Khettro Paul Sritiratno* (I. L. R. 5 Calc. 886 : 6 C. L. R. 199, the original was more than thirty years old. In *Umesh Chandra Ghosh* v. *Shama Sundari Bai* (I. L. R. 7 Calc. 98 : 8 C. L. R. 489), a debt due upon a registered bond had been sold in execution, and the purchaser was unable to effect the production of the original bond. Under the circumstances it was held that he had not laid a sufficient foundation for giving secondary evidence. In *Haripria Debi* v. *Rukmini Debi*, I. L. R. 19 Calc. 438, their Lordships of the Privy Council remarked that whether

or not there was evidence of such an amount of search for the original as would justify the Court in admitting secondary evidence of it was a point which was proper to be decided by the Judge of first instance, and was to be treated as one depending very much on his discretion. The conclusion, it was said, should not be overruled except in a very clear case of miscarriage. As to the value of a *latbandi* as secondary evidence of a certificate of sale, see *Asturan* v. *Mohan Lal*, 21 W. R. 333.

(*d*) when the original is of such a nature as not to be easily moveable ;

Any secondary evidence is here admissible, see below.

(*e*) when the original is a public document within the meaning of section 74 ;

A *certified copy* is the only evidence here admissible, see below.

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence :

A certified copy is the only evidence here admissible, see below.

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

See the last clause of the section, and *ante*, page 218.

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence is admissible.

In *Kunneth Odangat Kalandan* v. *Vayoth Palliyil Kunhunni* (I. L. R. 6 Mad. 90), it was said that this provision applies only when the public document is still in existence on the public records, and does not interfere with the general rule in clause (*c*) that any secondary evidence may be given when the original has been destroyed or lost. See also *The Ava* v. *The Brenhilda*, I. L. R. 5 Calc. 568.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Case (*c*). The person desiring to give the secondary evidence must show that the original has been destroyed or lost, &c., see section 104, *post*, and Illustration (*b*) thereto. Proof of loss may be given by

evidence that the document once existed, and that search was made for it to no purpose in the place or places where it would most likely be found. This search need not necessarily have been recent or made for the purposes of the suit. The Lords of the Judicial Committee of the Privy Council very early applied to Indian cases the rule that copies are inadmissible without proof of search for the originals—see *Asadúla* v. *Imaman*, 1 Moo. I. A. 41: also the later cases of *Bhubanessari Debi* v. *Hari Saran Sarma Moitro*, I. L. R. 6 Calc. 723: 8 C. L. R. 339: and *Krishna Kishori Chaudhurani* v. *Kishori Lal Rai*, I. L. R. 14 Calc. 486: L. R. 14 I. A. 71. In the case of *Abbas Ali Khan* v. *Yadim Rami Reddy* (3 Moo. I. A. 156), a bond was said to have been torn, and the alleged fragments were produced, but there was no evidence that they were really the fragments of the bond in question. See also *Sukram Súkal* v. *Ramlal Súkal*, 9 W. R. 248 *Rúpmanjúri Chaudhrani and Jagat Chandra Sirkar* v. *Ram Lal Sirkar*, 1 W. R. 145: *Mafizudín Kazi* v. *Meher Ali*, 1 W. R. 212: and *Ishan Chandra Chaudhri* v. *Bhairab Chandra Chaudhri*, 5 W. R. 21. There is one case in which oral evidence cannot be admitted of a writing destroyed or lost, and which therefore forms an exception to the general rule contained in this clause, *viz.* when the writing is an acknowledgment which would have the effect of extending the period of limitation under section 19 of the Indian Limitation Act, XV of 1877.

Examples of case (*d*) are inscriptions on walls, tombstones, monuments (see *ante*, pp. 167, 194), surveyors' marks on boundary trees, and where an alleged libel had been written on the wall of the Liverpool gaol.

Case (*d*).

Case (*f*) See sections 76—78, *post*.

Case (*g*) See also section 394 of the Code of Civil Procedure, *ante*. p. 219.

With reference to the last four paragraphs, which provide what kind of secondary evidence is to be given in each case, it may be observed that there is no provision for cases in which two causes for non-production of the original are combined. For example, if the original be a record of a Court of Justice (*e*); and if it also have been lost or destroyed (*c*.) Such a case has more than once occurred in India. In *Gúrú Dyal Singh* v. *Darbari Lal Tewari* (7 W. R. 18) the record was lost in transit from the Court of first instance to the Appellate Court, and the Calcutta High Court directed the admission of secondary evidence of the papers which made up the entire record—See also *Banwari Lal* v. *Furlong*, 8 W. R. 38. *Imaman* v. *Hardyal Singh*, W. R. 1864, p. 301 (Decree destroyed during the Mutiny): and *Ranjit* v. *Chuni Lal*, 1 N. W. P. Rep. 78. But see the cases at I. L. R. 6 Mad. 80 and I. L. R. 5 Calc. 568 quoted above on page 385.

This section is applicable to both civil and criminal cases, and is a relaxation of the rule of English law, which requires stricter proof in criminal than in civil proceedings, and under which it was decided that in the former the original registers of births, deaths, marriages, &c., must be produced, and that copies will not be sufficient.

Objections to admission of copies.

When copies of documents have been admitted and read in evidence in the Court of first instance without objection, no objection to their admissibility can afterwards be taken in a Court of appeal: *Akbar Ali* v. *Bhyea Lal Jha*, I. L. R. 6 Calc. 666: 7 C. L. R. 497: *Mahabir Das* v. *Lalla Rai*, 1 W. R. 12: *Gaur Saran Das* v. *Kanhya Singh*, 2 W. R. 237: *Kashi Nath Mukharji* v. *Mahesh Chandra Gupta*, 25 W. R. 168: *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*, I. L. R. 11 Bom. 320.

Non-registration.

Secondary evidence of a document cannot be given when the original is inadmissible owing to its not being registered: *Ram Chandra Haldar* v. *Gobind Chandra Sen*, 1 C. L. R. 542: *Kabulan* v. *Shamshir Ali*, 11 W. R. 16: *Dinonath Mukharji* v. *Debnath Mallik*, 5 B. L. R. App. 1: 13 W. R. 307: *Varada* v. *Krishnasami*, I. L. R. 6 Mad. 117. A receipt which should have been registered but has not been registered is inadmissible as evidence of the payment, but the payment may, nevertheless, be proved by parol evidence under Illustration (e), s. 91: *Dalip Singh* v. *Durga Prasad*, I. L. R. 1 All. 442. This was dissented from in *Venkayyar* v. *Venkatasubbayar*, I. L. R. 3 Mad. 33, with regard to the receipt requiring registration, but approved of as to the admissibility of oral evidence in proof of the payment. A document which creates an interest in land and is inadmissible for want of registration is still admissible for the purpose of obtaining a specific performance of the contract: *Adakkalam* v. *Theethan*, I. L. R. 12 Mad. 505: *Nagappa* v. *Devu*, I. L. R. 14 Mad. 55.

Insufficiently stamped documents.

Secondary evidence is inadmissible when the original document cannot be received in evidence because insufficiently stamped: *Ankar Chandra Ra Chaudhri* v. *Madhab Chandra Ghosh*, 21 W. R. 1: *Prosanno Nath Lahiri* v. *Tripura Sundari Debi*, 24 W. R. 88: *Mathur Mohan Rai* v. *Piari Mohan Sha*, 2 C. L. R. 409: *Kanhoya Lal* v. *Stowell*, I. L. R. 3 All. 581: *Benarsi Das* v. *Bhikhari Das*, I. L. R. 3 All. 717: *Sirdar Kuar* v. *Chandrawati*, I. L. R. 4 All. 330: *Sennandan* v. *Kollakiran*, I. L. R. 2 Mad. 208: *Valiappa* v. *Mahommed Khasim*, I. L. R. 5 Mad. 166: *Pothi Reddi* v. *Velayudasivan*, I. L. R. 10 Mad. 94: and *Damodar Jayannath* v. *Atmaram Babaji*, I. L. R. 12 Bom. 434. But when the cause of action exists independently of the document, independent evidence of the original consideration may be given: *Golap Chand Marwari* v. *Thakurani Mahakum Kuari*, I. L. R. 3 Calc. 314: 2 C. L. R. 412: *Krishto Lal Ghosh* v. *Bonomali Rai*, I. L. R. 5 Calc. 611: 5 C. L. R. 43: *Akbar* v. *Sheikh Khan*, I. L. R. 7 Calc. 256: 8 C. L. R. 533: *Gaur Charan Sarma* v. *Jinnat Ali*, 11 C. L. R. 166: *Alfatunnissa* v. *Hossain Khan*, 12 C. L. R. 209: *Binjaram* v. *Raj Mohan Rai*, I. L. R. 8 Calc. 282: *Sheo Dial* v. *Prag Dat Misr*, I. L. R. 3 All. 229: *Hira Lal* v. *Daladin*, I. L. R. 4 All. 135: *Balbhadar Prasad* v. *Maharajah of Bettia*, I. L. R. 9 All. 351: and *Krishna Sami Pillai* v. *Ranga Sami Chetti*, I. L. R. 7 Mad. 112. But see *Pothi Reddi* v. *Velayudasivan*, I. L. R. 10 Mad. 94. When an instrument has been admitted in evidence, such admission cannot under

clause 3, section 34 of Act I of 1879, be called in question at any later stage of the same suit or proceeding on the ground of its being insufficiently stamped, except as provided in section 50 of the same Act.

Bankers Books.

Secondary evidence may also be given of contents of documents, when the documents are bankers' books. See *ante*, p. 219, and Act XVIII of 1891, (The Bankers' Books Evidence Act,) which will be found printed *in extenso* at the end of this work.

Rules as to notice to produce.

66. Secondary evidence of the contents[9] of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney, or pleader[1]], such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

If the document is in the possession or power of the person who desires to use it as evidence, he must produce it. In *Hira Lall* v. *Ganesh Prasad* (I. L. R. 4 All. 410), the Privy Council commented upon the procedure of the Sádr Court at Agra in accepting secondary evidence of a document which was in the plaintiff's custody without looking at the original.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) when the document to be proved is itself a notice;

(2) when from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

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[9] In section 65, "existence, condition, or contents" are spoken of. In section 66, "contents" only occurs. Can secondary evidence of existence or condition be given in any case without notice?

[1] The words in brackets were added by the amending Act XVIII of 1872.

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

For instances under clause (6), see *Ralli v. Gau Kim Swee*, I. L. R. 9 Calc. 939; and *Bishop Mellus* v. *The Vicar-Apostolic of Malabar*, I. L. R. 2 Mad. 295.

According to English practice a *notice to produce* is used for an adversary in the cause; while a stranger legally compellable to produce a document is served with a *subpœna duces tecum*. It would appear from clause (*a*) of section 65 that the notice to produce referred to in sections 65 and 66 is a notice served either on an adversary or on a stranger.

Section 70 and sections 131, 134, 163, and 164 of the Code of Civil Procedure, which lay down the procedure to be followed when applying for the production or inspection of documents, may be read in connection with the subject.

See also sections 162, 163, and 164 of the Evidence Act, *post*.

Persons omitting to produce documents after service of notice, may be proceeded against criminally under section 175 of the Indian Penal Code.

Sections 94 to 98 of the Code of Criminal Procedure lay down the procedure for the production of documents in criminal cases.

Proof of signature and handwriting of person alleged to have signed or written documents produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

As to the method of proof, see section 47, *ante*, and section 73, *post*. It is very commonly the practice with Munsifs and other Subordinate Judicial Officers, when taking the evidence required by this section, to record merely that the witness verified ('*tasdik kiya*' or some similar expression) the document without stating the exact nature of the evidence offered or the statement made by the witness. In *Ganga Persad* v. *Inderjit Singh* (23 W. R. 390), the Lords of the Privy Council said:—"The documentary evidence on which the defendants' case principally rested consisted of two *amanat-námas* and the endorsements of payments thereon, which purported to have been signed by the plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were *identified and verified*, as the Judge says, by the witnesses; the witnesses would have been called upon to state whether they saw B S sign

the first, or B S and A sign the second; or, if not, whether they could speak to the handwriting, and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted." If the parties are not represented by pleaders, who understand their duty sufficiently to question the witnesses upon these essential details, the Judge should undoubtedly supply the omission—see *ante*, page 37, note In *Nilkant Pandit* v. *Jagabandhu Ghosh* (12 B. L R App 18), it was contended that the above section renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. *Mitter, J*, observed that this is not expressly stated in the section, and that it did not appear to him that such was the intention of the Legislature; that the section merely states with reference to deed what is the universal rule in all cases, that the person who makes an allegation must prove it, but lays down no new rule as to the kind of proof which must be given.

In another case *Abdul Ali* v *Abdul Rahman*, 21 W. R 429, *Couch, C J.*, pointed that it was not necessary to prove a document that the subscribing witnesses or the writer of the document should be produced In *Abdulla Pari* v. *Gannibai* I. L R 11 Bom 630 a deed was produced which purported to have been executed by and to bear the mark of, the defendant Gannibai. She, however denied that she had executed the deed Her execution of the deed had been witnessed by four witnesses all of whom were dead In order to prove the deed the Counsel for the plaintiff called a witness who knew the handwriting of one of the attesting witnesses and who swore that the signature of that witness to the attestation clause of the deed was genuine. The Court held that the statement of the witness, who was also the writer of the deed, was admissible under section 32 clause (2), and on the authority of *Whitelocke* v *Musgrove*, 2 Cr and M 511, that this was sufficient proof of the execution of the deed to allow of its being put in evidence

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence

As to the documents which require by law to be attested, see the note to section 71, *post*

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the

signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

The admission here spoken of, which relates to the *execution*, must be distinguished from the admission mentioned in section 22, *ante*, p. 133, and from that mentioned in clause (*b*), section 65, *ante*, p. 384, which relate to the contents, &c.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Strictness of English law.

"The general rule," says Mr. Taylor, "which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled or a burnt deed; as also to one the execution of which is admitted by the party to it; and that, too, though such admission be deliberately made either in open Court, or in a subsequent agreement, or even in a sworn answer to a bill of discovery filed against the person in the cause. Nay, a party in a cause, who is called as a witness by his opponent, cannot be required or even permitted to prove the execution by himself of any instrument to the validity of which attestation is requisite, so long as the attesting witness is capable of being called. So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind; and the Court will not dispense with his presence on account of illness, however severe. If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner; and if he be taken suddenly ill, a motion must be made to postpone the trial."[2] These strict rules continued to be applied not only to documents *required by law* to be attested, but also to documents which, when produced, appeared to be signed by *subscribing witnesses*, until the passing of The Common Law Procedure Act, 1864 (see note to section 72, *post*). The above four sections of the Indian Act are applicable only to documents *required by law to be attested*, and they further contain a reasonable relaxation of that strictness which has been found in practice detrimental to justice. Their

Reasonably relaxed by the Indian Act.

[2] § 1641; § 1883, 8th edn.

provisions may thus be summarized :—(1) When there is an attesting witness alive, subject to the process of the Court and capable of giving evidence, he *must* be called. (2) When there is no attesting witness alive, subject to the process of the Court and capable of giving evidence, it must be proved by other evidence (see section 47, *ante*, and section 73, *post*) :—(*a*) that the attestation of one attesting witness at least is in his handwriting; and (*b*) that the signature of the person executing the document is in the handwriting of such person. The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence. If one of two or more attesting witnesses being called denies or does not recollect the execution of the document, it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced.

Signature.

The Evidence Act contains no definition of what is a "signature." Section 69 seems to imply that the attestation of the attesting witness must be in his own handwriting, which implication assumes that the witness knows how to write. As a matter of fact, however, the greater number of attesting witnesses in India are marksmen. The definition of "signature" contained in section 3 of The Registration Act, III of 1877, includes and applies to the affixing of a mark. See also section 50 of The Indian Succession Act, X of 1865, which speaks of the testator "signing or affixing his mark."[8] It has been decided under several Statutes in England that a signature by affixing a mark is a good signature. This principle has been adopted by the Code of Civil Procedure, section 2 of which contains the following provision :— "'signed' includes marked when the person making the mark is unable to write his name : it also includes 'stamped' with the name of the person referred to." This latter provision recognizes a custom, common in India, of using a seal or stamp on which the name of the person using it is engraved.

There are few documents which are required by law to be attested in India and out of the Presidency Towns. Wills made after the first day of January 1866, by persons other than Hindús, Muhammadans, or Budhists; and wills made by Hindús, Jainas, Sikhs, and Budhists on or after the first day of September 1870 in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay, or relating to immoveable property situate within those limits, must be attested (see sections 50 and 331 of Act X of 1865; and Act XXI of 1870). A mortgage, the principal money secured by which is one hundred rupees or upwards, and

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[8] It has been held that under this section witnesses must sign their names, and not merely affix their marks : *Fernandez* v. *Alves*, I. L. R. 3 Bom. 382 : *Nitai Gopal Sirkar* v. *Nagendra Nath Mitra Mazumdar*, I. L. R. 11 Calc. 429. See *Bissonath Dinda* v. *Doyaram Jana*, I. L. R. 5 Calc. 738. But it is sufficient if they affix their initials. They need not sign their full names : *Ammayee* v. *Yalumalai*, I. L. R. 15 Mad. 261.

a gift, of immoveable property can be effected only by a registered instrument signed by the mortgagor or donor and attested by at least two witnesses (see sections 59 and 123 of "The Transfer of Property Act," IV of 1882). As to bonds, see section 3, sub-section (4), clauses (*b*) and (*c*), Act I of 1879.

It does not very clearly appear from the above sections whether the attesting witness, when producible, must be called, if the document itself is not forthcoming, and is, therefore, not *used as evidence* (section 68), but secondary evidence is given of its contents under the provision of sections 65 and 66, *ante*. According to English law, when an instrument is proved to be in the possession of the adverse party, who refuses to produce it after notice, other evidence may be given without calling the attesting witness.

When the document is *thirty years old*, it is not necessary to call the attesting witnesses, see section 90, *post*.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

This section corresponds with section 37 of the repealed Act, II of 1855, and with section 26 of the Common Law Procedure Act, 1854, which latter is as follows:—"It shall not be necessary to prove by the attesting witness any instrument, *to the validity of which attestation is not requisite;* and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." The words in italics apply to two classes of cases, *viz.*:—*1st*, when the parties themselves, or those under whom they claim or act, have expressly directed that the instrument be attested by one or more witnesses; *2nd*, when attestation is required by some Act or Statute.

The use of the phrase "*required by law*" would appear to show that the section of the Indian Act is intended to apply to the latter class of cases only.

Comparison of signature, writing or seal with others admitted or proved.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

"The law, until the year 1854," says Mr. Taylor, "did not allow the witness or even the jury, except under certain special circumstances, actually

to compare two writings with each other in order to ascertain whether both were written by the same person. This technical rule of the Common Law —which was certainly *not* based on common sense, and which was directly opposed to the practice of our own Ecclesiastical Courts, of our Courts in India, of the French Courts, and of the Courts of many of the most enlightened States in America—was happily for the administration of justice abrogated by the Legislature, in the year just named, at least as far as relates to *civil* proceedings. In 1865, a further instalment of law reform was embodied in the Act of 28 and 29 Vict., cap. 18, which enacts in § 8, 'that comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.'" (§ 1869, 8th edn.; § 1667, 1st edn.). This section applies to *civil* cases only. The section of the Indian Act applies to all cases, civil and criminal. The comparison may be made by witnesses (see section 47, *ante*) or by the Court. The new section differs somewhat from the corresponding section (48) of the repealed Act, II of 1855, *viz.*: "On an enquiry whether a signature, writing or seal is genuine, any *undisputed* signature, writing or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause." The following cases decided under the old section may be referred to:—*Puran Chandra Chatarji* v. *Girish Chandra Chatarji*, 9 W. R. 450; *Rajendra Nath Haldar* v. *Jogendra Nath Haldar*, 7 B. L. R. 216 (Opinion of a Native Judge on a question of native handwriting preferred by the Judicial Committee to that of the English Judges of the High Court): and see *Phudi Bibi* v. *Gobind Chandra Rai* (22 W. R. 272), where a Munsif's view was accepted in preference to that of a Subordinate Judge, the latter having clearly made the comparison in some way which led to error; *Kurali Persad Misra* v. *Ambikam Hajra*, 8 B. L. R. 490, 16 W. R. P. C. 16. (Finding of forgery on comparison of handwriting only disapproved): and *Queen* v. *Kartik Chandra Haldar*, 5 R. C. and C. R. Crim. Rul. 58. In *Tara Prasad Tangi* v. *Lakhi Narain Panwar*, 21 W. R. 6, there was a question as to the genuineness of certain pattahs put in by the defendant. The Judge took the evidence of certain witnesses who swore that they had received their pattahs from the same persons, and compared the signatures on their pattahs with those on the pattahs put in by the defendant. It was held that the comparisons of the signatures had been rightly made, as the signatures on the pattahs put in by the witnesses had been proved to the satisfaction of the Court. In *Nobin Krishna Mukharji* v. *Rasik Lal Laha*, I. L. R. 10 Calc. 1047, a memorandum alleged to be in the handwriting of a certain person was received and tendered in evidence without any proof as to its being in that person's handwriting except that it bore a similarity to the proved handwriting of the accused. It was held that this evidence was not strong enough to prove that the memorandum was in the handwriting of the accused.

Can a witness, called to prove handwriting, be tested in cross-examination by showing him other documents and asking him whether they are in the same handwriting as that in dispute, and then if he reply in the affirmative, proving that they are not so? Mr. Taylor is in favour of such a practice. There does not seem to be anything in The Indian Evidence Act opposed to its adoption.

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents :—

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country ;

(2) public records kept in British India of private documents.

Under the provisions of clause (2) for example, certified copies of *wills* are admissible, the original wills being retained by the Courts after grant of probate or letters of administration. As to *registered documents*, see section 57 of Act III of 1877.

A certificate of the Board of Trade was held not to be a public document (*The Ava* v. *The Brenhilda*, I. L. R. 5 Calc. 568 : 5 C. L. R. 331). A *jamabandi*, prepared by a Deputy Collector engaged in the settlement of land under Regulation VII of 1822, is a public document (*Taru Patur* v. *Abinash Chandra Dutt* I. L. R. 4 Calc. 79), but this has been held open to doubt : *Ram Chandra Sahu* v. *Banshidhar Naik*, I. L. R. 9 Calc. 741 · *Akhai Kumar Datta* v. *Shama Charan Patitunda*, I. L. R. 16 Calc. 586. Chittas produced from the Collectorate, there being nothing to show that they were made by a Government officer are not public documents : *Nityanand Rai* v. *Abdu · Rahim*, I. L. R. 7 Calc. 76 · *Ram Chandra Sahu* v. *Banshidhar Naik*, I. L. R. 9 Calc. 741. In *Prithi Singh* v. *The Court of Wards on behalf of Sheo Sundari* (23 W. R. 272), letters which passed between the district authorities were admitted to show that a certain person mentioned therein was alive at the time they were written. Registers of *chakeran* lands are public records : *Collector of East Burdwan* v. *Imdad Ali*, W. R. 1864 : 358. An *anumati patra* or instrument giving permission to adopt is not public document · *Krishna Kishori Chaudhurain* v. *Kishori Lall Rai*, I. L. R. 14 Calc. 486 · L. R. 14 I. A. 71. Neither is a *teiskhana* register prepared by a patwari under rules framed by the Board of Revenue under section 16 Reg. XIII of 1817 : *Baij Nath Sing* v. *Sukhu Mahton*, I. L. R. 18 Calc. 53 The record of a confession of an accused person recorded by the Magistrate

of Bhind, in Gwalior, probably is a public document: *Queen-Empress* v. *Sugdar Singh*, I. L. R. 12 All. 595.[4]

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Who are entitled to certified copies?

Whether or not a person will be *entitled to a copy of a public document* will therefore depend upon whether or not he has *a right to inspect it.* The question whether a person has a right to inspect any particular document or documents will in some cases be somewhat difficult to answer. There is no general provision on the subject to be found in any enactment in force in British India, although there are some special provisions applicable to particular cases, which will be noticed presently. Mr. Taylor, speaking of the Statute[5] which placed under the charge and superintendence of the Master of the Rolls the records of the Executive, Legislative, and Judicial Departments of the British Government, observes that it contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them. He further observes that, although at the present day the question, whether the public have a strict legal right to inspect these

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[4] In *Mahomed Shahabudin* v. *Wedgeberry*, 10 B. L. R. App. 31, a certified copy of a plaint was admitted in evidence under this section, apparently on the ground that, being part of a record, it was a public document. But this is manifestly wrong.

[5] 1 & 2 Vict. cap. 94.

records, is not likely to be mooted,[6] it would be difficult to establish the right except as to such of the documents as are the records of the superior Courts of law or equity; and even with respect to these it may be doubtful whether the Queen's Bench would interfere by *mandamus*, unless the applicant was prepared to show that he was interested in the document which he sought to inspect. Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the Court or of the chief executive Magistrate, or of the head of the department under whose control they may be kept, be *injurious to the public interests*, an inspection would not be granted.[7]

Acts entitling to copies or to inspection.

Under the provisions of The Indian Registration Act, III of 1877, five Registers are kept, *viz.* Nos. 1, 2, 3, and 4, in all Registration Offices; and No. 5 in the offices of Registrars. I.—In Book No. 1 are entered or filed all documents or memoranda which have been registered and which relate to *immoveable property* and are not wills, whether the registration of such documents or memoranda be compulsory or optional II.—In Book No. 2 are recorded the reasons for refusals to register. III.—Book No. 3 is the Register of wills and authorities to adopt. IV.—Book No. 4 is a Miscellaneous Register in which are entered all instruments other than those relating to immoveable property. V —Book No. 5 is the Register of Deposits of wills deposited with Registrars in sealed covers.[8] Books Nos. 1 and 2, and the Indices to Book No 1, are at all times open to inspection by any person applying to inspect the same: and copies of entries in these books must be given to *all persons* applying therefor. Copies of the entries in Book No. 3 and in the Index relating thereto must be given to the persons executing documents to which such entries relate or to their agents, and after the death of the executants (but not before) to any person applying for such copies. Copies of entries in Book No. 4 and in the Index relating thereto must be given to any person executing or claiming under the documents to which such entries respectively refer or to his agent or representative. The requisite search for entries in Books Nos. 3 and 4 can be made only by the Registering Officer. All such copies are to be signed and sealed, and they are *admissible for the purpose of proving the contents of the original documents.*[9] Persons are entitled to search Marriage Registers kept under Act XV of 1872 and to obtain copies thereof.[1] Declarations of the keepers of printing presses and of the printers and publishers of periodicals are open to inspection, and copies of them must be given on payment of the proper fee.[2] The Register of copyright in books published in India, kept in the office of the Secretary to the Government of India, is open to inspection,

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[6] Rules having been made, under which *free access* is afforded to all persons having occasion to inspect them.
[7] Taylor, § 1336; § 1483, 8th edn.
[8] See sections 17, 18, 42 and 51 of The Registration Act.
[9] See section 57 of The Registration Act.
[1] See sections 79 and 80 of the Act.
[2] See section 6, Act XXV of 1867.

and copies of the entries therein are to be given to persons applying for them.[3] Every person is entitled to inspect the Registers and documents kept by the Registrar of Joint Stock Companies and to obtain copies.[4] Under the provisions of section 43 of Act II of 1874, the books kept by the Administrator General are open to the inspection of all persons during office hours and upon payment of a reasonable fee. None of the Acts to which reference has just been made contains any particular remedy to which resort may be had if inspection or copies be refused: but an order directing the public officer concerned to do his duty in the matter may now be obtained from the High Court under the provisions of Chapter VIII of "The Specific Relief Act," I of 1877. In England the remedy is by application to the Court of Queen's Bench for a *mandamus*. Registers of British ships (Act X of 1841, section 4), log books (Act I of 1859, sections 103—108), and registers kept under the Oudh Land Revenue Act (XVII of 1876, section 67) are also public documents of entries in which certified copies are admissable in evidence.

Records of Civil Courts.

Under the provisions of the Code of Civil Procedure (sections 217 and 580) certified copies of the judgment and decree of first instance and on appeal must be furnished to the parties on their application and at their expense. There is no express provision of the Legislature entitling parties or others to copies of any other portions of the records of the Civil Courts but, as a matter of practice, copies are usually given to any of the *parties* who may apply for them. The Calcutta High Court have made the following rules on the subject:—(1) A plaintiff, or a defendant, who has appeared to the suit, is entitled at any stage of the suit to obtain copies of the records of the suit, including exhibits, which have been put in and finally accepted by the Court as evidence. A party, who has been ordered to file a written statement, is not entitled to inspect or take a copy of a written statement filed by another party until he has filed his own. (2) A stranger to the suit may after decree obtain, as of course, copies of the plaint, written statements, affidavits, and petitions filed in the suit; and may, for sufficient reason shown to the satisfaction of the Court, obtain copies of any such documents before decree. (3) A stranger to the suit may also obtain, as of course, copies of judgments, decrees or orders at any time after they have been passed or made. (4) A stranger to the suit has no right to obtain copies of exhibits put in evidence, except with the consent of the person by whom they were produced.[5]

Records of Criminal Courts.

In criminal cases an accused person, committed under the Code of Criminal Procedure to the High Court or to the Court of Session, is entitled to a copy of the charge free of all expense; and, if he apply

[3] See section 3, Act XX of 1847. As to copyright in England, see 5 and 6 Vict. cap. 45, and 25 and 26 Vict. cap. 68.

[4] See clause (*e*), section 220 of Act VI of 1882. For other public Registers in India, see *ante*, pp. 221, 222.

[5] *General Rules and Circular Orders* Part I, Chapter IV, Rule 6, p. 120.

within a reasonable time, to copies of the depositions; these latter copies to be made at his expense, unless the Magistrate see fit to give them free of cost (see sections 210 and 548 of Act X of 1882). He is entitled free of cost to a copy of the evidence of any witness examined by a Magistrate (other than a Presidency Magistrate) after commitment (section 219 *id*).

Under the provisions of section 371 "the judgment shall be explained to the accused, and on his application a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or, in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost. In trials by jury in a Court of Sessions, a copy of the heads of the charge to the Jury shall, on the application of the accused, be given to him without delay and free of cost." Section 548 enacts that "if *any person affected* by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's *charge to the Jury or of any* order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith: provided that he pay for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost."[6]

It is to be noted that the certificate of the copy being a true copy is to be written *at the foot* of such copy, and not at the top, as has until recently been the practice, in Bengal at least.

For the presumption that is to be made as to the genuineness of certified copies, see section 79, *post*.

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

It may be well to observe that the contents of public documents only can be proved by certified copies. The contents of private documents, such as *kabalas*, conveyances, leases and the like filed in a Court or public office for purposes of evidence in a suit, are not so provable in another suit: *Harihar Mazumdar* v. *Charan Monjhi*, 22 W. R. 355; L. R. 14 I. A. 71: *Krishna Kishori Chaudhurani* v. *Kishori Lal Rai*, I. L. R. 14 Calc. 486. In *Bhagain Magh Rani Koer* v. *Guru Persad Singh*, 25 W. R. 68, a suit had been compromised, and a petition was presented to the Court praying that the arrangement made between the parties should be carried out. Upon that petition the

[6] The former Code of Criminal Procedure contained no provisions entitling parties to copies of any papers other than depositions in summons or warrant-cases tried by Magistrates or in cases tried by the Court of Session. Under that Code the Madras High Court refused to direct a Sessions Judge to furnish a person convicted with copies of the notes of the evidence and proceedings in the case (*Queen* v. *Subbaya Gaundan*, 1 Mad. Rep. 138). In a case which came before the Calcutta High Court, it was held that a Magistrate had wrongly refused to a prisoner under trial before him copies of certain papers which he required for his defence. In three at least of the four papers with which this case was concerned, the prisoner had an interest, although none of them fell within the express provision of the law (*In the matter of the petition of Sib Persad Panda*, 6 B. L. R. App. 59).

Court made an order confirming the agreement, and then the power-of-attorney, the agreement and the order of the Court were all entered upon the record. In a subsequent suit the original proceedings were sent for and examined and an office copy was produced. In the High Court only the office copy of the proceedings was produced, but it was held that in the circumstances this was sufficient. In *Mahomed Shahabudin* v. *Wedgeberry*, 10 B.L.R. App. 31, which was a suit arising out of an alleged trespass, the judgment of the Munsiff in a previous suit between the parties, as well as the decree, plaint and written statement were tendered in evidence as being public documents. The admission of the plaint and written statement was objected to. *Pontifex, J.*, however, admitted the plaint, but rejected the written statement. It is clear that in this case the written statement was rightly rejected but the plaint was improperly admitted. Both were private documents, and neither should have been admitted.

Proof of other official documents.

78. The following public documents may be proved as follows :—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government :

(2) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government :

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer :

As to regulations made by the Board of Trade under The Merchant Shipping Act Amendment Act, see 25 and 26 Vict. cap. 63, s. 26.

(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition

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thereof in some public Act of the Governor-General of India in Council:

(5) The proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(6) Public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

The Documentary Evidence Act, 1868.

In connection with this section should be read *The Documentary Evidence Act*, 1868, 31 and 32 Vict. cap. 37, the portions of which concerned with evidence are as follow:—

2. *Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all Courts of Justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(*a*) By the production of a copy of the *Gazette* purporting to contain such proclamation, order, or regulation:

(*b*) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government Printer,[7] or where the question arises in a Court in any British Colony or Possession, of a copy purporting to be printed under the authority of the Legislature of such British Colony or Possession:

(*c*) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and in the case of any proclamation, order, or regulation issued by or under the authority of

[7] Or, "under the superintendence or authority of Her Majesty's Stationery office," see 45 Vict. cap. 9, s. 2. This Statute extends *The Documentary Evidence Act*, 1868, to proclamations, orders and regulations issued by the Lord Lieutenant or other Chief Governor of Ireland.

any of the said Departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such Department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

3. Subject to any law that may be from time to time made by the Legislature of any British Colony or Possession, this Act shall be in force in every such Colony and Possession.

Interpretation Clause.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction (that is to say)—

"British Colony and Possession" shall, for the purposes of this Act, include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for *the Government of India* and all other Her Majesty's dominions.

"Legislature" shall signify any authority other than the Imperial Parliament of Her Majesty in Council competent to make laws for any Colony or Possession.

"Privy Council" shall include[a] Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.

"Government Printer" shall mean and include the Printer to Her Majesty and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the Legislature of any British Colony or Possession, or otherwise to be the Government Printer of such Colony or Possession.

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

SCHEDULE.

Name of Department or Officer.	Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.

[a] It also includes the Privy Council in Ireland or any Committee thereof, see 45 Vict. cap. 9, s. 4.

SCHEDULE—(*Continued.*)

NAME OF DEPARTMENT OR OFFICER.	NAMES OF CERTIFYING OFFICERS.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.

As to the proof in England and Ireland of proclamations, treaties and other Acts of State, of Foreign States, or of British Colonies, and of judgments, decrees, orders and other judicial proceedings of Courts in such States or Colonies, see the 14 & 15 Vict. cap. 99 (Lord Brougham's Act), section 7, in connection therewith section 82, *post*.

Section 12 of *Naturalization Act*, 1870, 33 Vict. cap. 14, contains the following regulations as to evidence of the declarations, certificates, &c., authorized by the Act.

Naturalization Act, 1870.

The following regulations shall be made with respect to evidence under this Act:—

(1) Any declaration authorized to be made under this Act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned

(2) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate.

(3) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal

Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate :

(4) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register.

(5) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of, or for the purpose of carrying into effect, any of the provisions of this Act.

See also section 19 of The Extradition Act, XXI of 1879, *ante*, p. 207. See as to proof by recitals in Statutes, Acts, &c., section 37, *ante*, p. 230. See as to the presumption to be made with respect to seals, signatures and official character, section 82, *post*, p. 407.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.

This section applies only to certificates, certified copies, or other documents certified by *officers in British India or by duly authorized officers in allied Native States*. The presumption that the document itself is genuine, of course, includes the presumption that the *signature* and the *seal* (where a seal is used, see section 76, *ante*) are genuine. The last clause of the section provides for presumption as to *official character*. For similar presumptions as to similar documents certified by officers other than those above specially designated see section 82, *post*, p. 407.

Having advertence to the definition of "shall presume" (*ante*, page 89), it will be open to the other side to give evidence to show that the certificate,

certified copy, or other document is not genuine, or that the officer by whom such document purports to be signed or certified does not hold the official character which he claims in such paper.

For an example of certificates, see section 60 of The Registration Act, III of 1877, and sections 467, 473 and 511 of the Code of Criminal Procedure, Act X of 1882.

Presumption as to documents produced as record of evidence.

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

The case of *Badri lal* v. *Bhusi Khan*, 25 W. R. 134, is an instance of a case in which a deposition given by a witness in a mutation case was held admissible under this section in a subsequent suit. In *Queen* v. *Nasarudin*, 21 W. R. Cr. 5, a deposition was held inadmissible on the ground that it had not been shown that it had been taken in the presence of the accused, that is, the person against whom it was endeavoured to be used. See section 33, *ante*, p. 198. In *Queen Empress* v. *Durga Sonar*, I. L. R. 11 Calc. 580, a deposition was rejected because there was no proof that the person who made it was identical with the person against whom it was subsequently used in evidence. A confession of an accused recorded by the Magistrate of Bhind in Gwalior is admissible in evidence under rule 80: *Queen Empress* v. *Sundar Singh*, I. L. R. 12 All. 595.

If, on a trial for intentionally giving false evidence a document were produced for the prosecution which purported to be a record of the evidence given by the prisoner, and which was charged to be false, could the Court presume therefrom that the prisoner had, when deposing as a witness, used the very words which appeared in such record, or their vernacular equivalent? See the cases of *Queen* v. *Fatik Biswas*, 1 B. L. R. A. Cr. 13; *Queen* v. *Gancur*, 22 W. R. Cr. 2: *Queen* v. *Mangal Das*, 23 W. R. Cr. 28: and *Queen-Empress* v. *Saimappa*, I. L. R. 15 Mad. 63. In the last of these cases it was observed that section 80 provides, *inter alia*, that the Court shall presume that the evidence was duly taken and it could not be considered to be duly taken if it did not contain what the witness actually stated. It is, of course,

always open to the defence to show that the language used by the prisoner has not been accurately recorded; see the definition of "shall presume," *ante*, p. 89. In the case of *Bihari Lal Basu* (9 W. R. Cr. 69), it was held that the failure of a Collector to make an English memorandum of the evidence as required by law could not prevent the depositions recorded at full length in the vernacular from being used against a prisoner on his trial for intentionally giving false evidence. In the case of *Mayadeb Gosami* (I. L. R. 6 Calc. 762 : 8 C. L. R. 292), the deposition was made in Assamese, was translated by the Sarishtadar of the Civil Court, and recorded by the Judge in English. The Judge did not sign the deposition, nor was it read over or interpreted to the witness. The provisions of sections 182 and 183 of the Code of Civil Procedure which require that the evidence be taken down in writing in the language of the Court, that it be read over to the witness, that if he do not understand the language in which it has been taken down, it be interpreted to him in the language in which it was given, and that the Judge shall (if necessary) correct it and sign it, were not complied with. It was held that the deposition so informally taken could not be used in evidence upon the trial of the witness for giving false evidence; and that under section 91 of The Evidence Act, no other evidence of his deposition was admissible.

It is to be observed that it is only a document which purports to be a record or memorandum of the evidence (see section 4) or any part of it given by a witness in a judicial proceeding, with regard to which the presumptions prescribed by this section are to be made. Statements made by persons to Police-officers during the course of a Police enquiry do not, therefore, come within the purview of this section. In *Raghuni Singh* v. *Empress*, I. L. R. 9 Calc. 455 : 11 C. L. R. 569, it has been pointed out that such statements are not depositions; they do not prove themselves, and can only be used for the purpose of refreshing the memory of the Police-officer who recorded them. Again, in *Queen-Empress* v. *Sitaram Vithal*, I. L. R. 11 Bom. 657, it has been said that a statement reduced to writing by a Police-officer under section 162, C. P. C., cannot have the effect of a deposition. See also *in the matter of the petition of Kali Charan Chunari*, I. L. R. 8 Calc. 156 : 10 C. L. R. 51 : *Bikao Khan* v. *Empress*, I. L. R. 16 Calc. 616 : and *in the matter of Mahomed Ali Haji*, I. L. R. 16 Calc. 617.

The circumstances under which the statements or confessions of accused persons are admissible or inadmissible in evidence and all the judicial rulings on this subject have been already detailed. (See note to section 29, *ante*, *pp.* 154, 155.)

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.

81. The Court shall presume the genuineness of every document purporting to be the London Gazette, or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency,

or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

See section 37. *ante*, and section 90, *post*, the explanation to which latter section applies also to this section; and as to *private Acts*, see *ante*, p. 376.

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

For some documents which would be admissible in Courts of Justice in England or Ireland without proof of seal, signature, or official character, see 33 & 34 Vict. cap. 52. *ante*, p. 212: section 2 of the Documentary Evidence Act, 1868, *ante*, p. 401; and 14 & 15 Vict. cap. 99. section 7.

8 & 9 Vict. cap. 113.

The 8 & 9 Vict. cap. 113, "The Documentary Evidence Act, 1845," enacts that whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed or signed alone, as required or impressed with a stamp and signed, as directed by the respective Acts

made or to be hereafter made, *without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person* appearing to have signed the same and without any further proof thereof, in every case in which the original record could have been received in evidence. No proof is required of the seal, signature, or official character of any British Ambassador, Envoy, Minister, Charge d'Affaires, Secretary of Embassy or of Legation, Consul-General, Consul, Vice-Consul, Acting Consul, Pro-Consul or Consular Agent in testimony of any oath, affidavit, affirmation or notarial act having been administered, sworn, affirmed, had or done by or before him.

18 & 19 Vict. cap. 42, section 3.

Section 9 of Lord Brougham's Act 14 and 15 Vict. cap. 99, enacts that every document which, by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular in any Court of Justice in *England* or *Wales* without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in *Ireland*, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, *without proof of the seal, or stamp, or signature* authenticating the same, or of the *judicial or official character* of the person appearing to have signed the same. Section 10 contains provisions precisely similar, rendering admissible in England or Wales without proof of seal, &c., documents which are so admissible in Ireland. Section 11 further contains similar provisions rendering admissible to the same extent and for the same purpose in the *British colonies* without proof of seal, &c., such documents as are so admissible in England, Ireland, or Wales.

14 & 15 Vict. cap. 99, section 9.

Section 10, *id.*

Section 11, *id.*

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to maps or plans made by authority of Government.

See *ante*, pp. 224—230: *Niyamatula Khadim* v. *Himmat Ali Khadim*, 22 W. R. 519.

The word "accurate" in this section means accurate as regards the drawing and measurement. It does not refer to laying down boundaries according to the rights of the parties: *Amrito Lal Chaudhri* v. *Kali Prasad Sha*, 25 W. R. 179. A map prepared by an officer of Government while he was in charge of a *khasmahal*, the Government being in possession of that *mahal* merely as a private proprietor, does not come within the purview of this section. It cannot be presumed to be accurate, but it is admissible under section 13, as evidence of possession of or assertion of right: *Janmajai Mallik*

v. *Dwarka Nath Mahanti*, I. L. R. 5 Calc. 287 : 4 C. L. R. 574 : *Ram Chandra Sahu* v. *Bansidhar Naik*, I. L. R. 9 Calc. 741. The fact that a Government survey has been set aside and a fresh survey ordered does not affect the presumption of law to be made under this section in favour of a previous survey map, which must be presumed to be correct until the contrary is shown by the parties. It does not prove the contrary to show that the general survey had been set aside, because it is quite consistent with that order that the actual bearing of the land in suit should be correct: *Jogessar Singh* v. *Baikantho Nath Datta*, I. L. R. 5 Calc. 822 · 6 C. L. R. 519. In a recent case, *Jarao Kumari* v. *Lalan Mani*, I. L. R. 18 Calc. 224, their Lordships of the Privy Council have pointed out that a *tukbast* map cannot be regarded as raising a presumption of correctness as to the amount of *debattar* land in one of the villages shown in the map, as the *amin* who made it had no authority to determine what lands were *debattar*, but only to lay down and to map boundaries.

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

In connection with the same subject, see section 38, *ante*, p. 232, and The Indian Law Reports Act, XVIII of 1875.

Presumption as to powers-of-attorney.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

See also, as to powers-of-attorney, section 33 of The Indian Registration Act. Except for registration purposes, there is no presumption as to the genuineness or otherwise of a registered power-of-attorney; and mere registration is not in itself sufficient evidence of its execution *Salimatal Fatima* v. *Kailashpati Narain Singh*, I. L. R. 17 Calc. 903. In this case a ruling in *Krishna Nath Kundu* v. *Brown*, I. L. R. 14 Calc. 176, to the contrary effect, was dissented from.

There is, I believe, no law in force in India which requires a Court, Judge, or Magistrate to authenticate the execution of a power-of-attorney.[a]

[a] See Bengal Government Circular No. 16 of 21st March 1871.

With respect to Notaries Public, see the 41 Geo cap. 79: 3 & 4 Will. IV. cap. 70: 6 & 7 Vict. cap. 90: and 18 & 19 Vict cap. 42. The enactment last quoted empowers ambassadors and British diplomatic and consular agents in foreign countries and places to do abroad all such notarial acts which Public Notaries may do in the United Kingdom of Great Britain and Ireland. There is in India no general law relating to Public Notaries. But "The Negotiable Instruments Act, 1881," provides for the appointment of persons by the Governor-General in Council to perform the functions of a Notary Public under the Act.—See sections 3, 99, 100 to 102 of Act XXVI of 1881.

In the goods of *A. J. Primrose*, I. L. R. 16 Calc. 776, it was held that a power-of attorney which had been declared before the Lord Provost of Edinburgh to have been duly executed by the executant, and the signatures of the witnesses to which had been declared before the same authority to be of their own proper handwriting had not been executed or authenticated in accordance with the provisions of this section. The application made on the authority of such a power of-attorney was therefore refused.

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India [in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3 of The Foreign Jurisdiction and Extradition Act, 1879, and section 190 of the Code of Criminal Procedure, 1882, shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

See *ante*—clause 6, section 78; and section 82.

The words within brackets in the first clause were substituted for "resident in," and the latter clause of the section was added by section 8, Act III of 1891, in consequence of the ruling in *Ghani Mahomed Sarkar* v. *Tarini Charan Chakravartti*, I. L. R. 14 Calc. 546, in which it was held that there is now no representative of Her Majesty or of the Government of India residing in Kuch Behar, and, consequently, that certified copies of judicia records of that State could not be received in evidence in the Courts of British India, under the provisions of this section, as then framed.

Presumption as to books maps and charts.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

See *ante*, section 36, and note thereto.

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

See *Explanation* 2 to section 62, and clause 2 of section 63, *ante*

Presumption as to due execution, &c., of documents not produced.

89. The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

As to "shall presume," see *ante*, section 4. With this section read section 66, *ante*, and section 164, *post*.

Presumption as to documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody

is improper, if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

Illustrations.

(*a*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his title to it. The custody is proper.

(*b*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

Reason of the rule.

"By the term 'ancient documents,'" says Mr. Taylor, "are meant documents more than thirty years old; and as these often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in Courts of Justice on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. No doubt, this species of proof deserves to be scrutinized with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents and from whose custody they have been produced; and next, the documents are not *proved* but are only *presumed* to have constituted part of the *res gestæ*. Still, as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and, at any rate, it is deemed more expedient to run some risk of occasional deception than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils this kind of proof has, for many years past, been admitted subject to certain qualifications."[1] It need scarcely be remarked that Mr. Taylor's remarks about forgery and fraud have reference to the state of things in England. They do not apply with equal force in India. In the case of *Alaka v. Kasi Chandra Datta* (1 W. R. 131), it was held by the Calcutta High Court that a *patta* cannot be taken to be genuine merely from its ancient

Such evidence to be scrutinized.

[1] § 593; § 658, 8th edn.

date, *when there is no evidence of its early existence and publicity.* And in *Gúru Persad Rai* v. *Baikant Chandra Rai* (6 W. R. 82), it was said :— "There is a rule in the English Law of Evidence, by which, when a document is produced from the proper custody and by the proper person, formal evidence of its execution is dispensed with, if the document be more than thirty years old. But the rule goes no further, and should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or jury to reject it, however ancient it may be. Here, assuming the English rule to be applicable to the Courts of this country, the appellants could derive no benefit from it; for, first, not having shown in whose custody the deed had been kept, the rule was not applicable ; and, even had this been shown satisfactorily, the Judge had still power to reject the document if, as in this case, he thought it to be a fabrication."

On this point *Couch, C. J.*, in *Phul Bibi* v. *Gur Saran Das*, 18 W. R. 485, has said : "With regard to documents of this nature, the rule of English Law has been adopted in this country that when a document is more than thirty years old, if it is free from suspicion of dishonesty, it may be admitted as evidence without proof of the execution or writing. But when we see the reason which is given for the adoption of this rule in the English Courts it becomes necessary to be extremely careful in the application of it to this country." After citing the passage, from Mr. Taylor's work, printed above, in which it is said that forgery and fraud are, comparatively speaking, of rare occurrence, the Chief Justice observed :—"We feel obliged to say that this reason has not the same weight in this country as it is supposed to have in England, and here less credit should be given to ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated. Even in England this evidence when unsupported is of very little weight." *Garth, C. J.*, has also, in *Trailokya Nath Nandi* v. *Sarno Changini*, I. L. R. 11 Calc. 539, pointed out the necessity of care in applying this rule in this country.

Mr. Philips[2] urges that, in order to render ancient documents admissible, proof of some act done with reference to them, or where the nature of the case does not admit of this, proof of acts of *modern enjoyment*, must be given. Mr. Taylor thinks that the absence of such proof should affect merely the *weight* and not the *admissibility* of the instrument[3]; and this appears to be the view that has been taken by the framers of the Indian Act. The above section makes documents *purporting or proved* to be thirty years old admissible as evidence without proof of execution, attestation, &c.; but the weight allowed to them would properly be inconsiderable where they are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof. In *Biseshar Bhattacharjya* v. *Lamb* (21 W. R. 22), the Privy Council, speaking of a lease alleged to have been granted in 1806, and of which no public notice, no mention, had been made up to 1854,

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[2] Work on Evidence, 276, 278.

[3] But see *Malcolmson* v. *O'Dea*, 9 Jur. N. S. 1135.

said :—" Now, in order to satisfy the Court that such a document as this was a valid document, intended to operate as a *mirasi* tenure, it would be important to prove that possession had accompanied it. The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it." As to the importance of evidence of possession or of acts done under or in accordance with the document, see *Srikanth Bharttacharji* v. *Raj Narain Bharttacharji*, 10 W. R. 1 : *Baikant Nath Kundu* v. *Lakhan Majhi*, 9 C. L. R. 429 : *Anand Chandra Pushali* v. *Mukta Keshi Debi*, 21 W. R. 130 : and *Grant* v. *Baijnath Tewari*, 21 W. R. 279. In *Hari Chintamani Dikshit* v. *Moro Lakshman*, I. L. R. 11 Bom. 89, *West, J.*, has said that the degree of credit to be given to a document more than thirty years old, which has been admitted in evidence, depends on circumstances, chiefly on the proof of transactions or states of affairs necessarily or at least properly or naturally referrible to it. Again, in *Timangavda* v. *Rangangavda*, I. L. R. 11 Bom. 98, he has said :—" Section 90 of The Evidence Act says only that the Court may presume that documents purporting to be more than thirty years old are genuine, no that it must presume them to be so, and experience teaches us that 'may presume' in such instances ought generally to be construed in the more rigorous of the senses allowed by section 4 of the Act. The illustrations indeed to section 90 are all cases of deeds relating to land produced by the person in possession, or by one to whom the person in possession has committed the custody of the documents. They do not extend to the documents by which a person out of possession strives to reduce the possession actually enjoyed by another to a temporary or limited interest : and it would be very unsafe to presume that the counterpart of a mortgage with possession by A to B for thirty-one years had really been executed by A and B when brought forward thirty-one years after its ostensible date by A's son for the purpose of depriving B's son of the property of which he was in possession, and should therefore be presumed to be the owner according to section 110 of The Indian Evidence Act. Such a document would be admissible as coming from proper custody, and such cases as *Doe dem Neale* v. *Samples* (8 A. and E. 151) sanction a liberal construction of what may be deemed proper custody ; but a document, thus adduced, without possession to support it and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference." See also *Ugrakant Chaudhri* v. *Haro Chandra Shikdar*, I. L. R. 6 Calc. 209, in which it has been said that a Court is not bound to accept as genuine the signature on a document upwards of thirty years old, even if it be produced from proper custody.

In *Khetra Chandra Mukharji* v. *Khetra Pal Sritiratno* (I. L. R. 5 Calc. 886 : 6 C. L. R. 199), secondary evidence of a will more than thirty years old was admitted, proof being given of its loss, but not of its execution. When a document more than thirty years old purports to be signed by an agent on behalf of a principal, there is no presumption as to the agent's

authority, which must be proved (*Abilak Rai* v. *Dallial Rai*, I. L. R. 3 Calc. 557: *Uyrakant Chaudhri* v. *Haro Chandra Shikdar*, I. L. R. 6 Calc. 209).

In *Minu Sirkar* v. *Rhidai Nath Rai*, 5 C. L. R. 135, it has been ruled that the period of 30 years referred to in this section is to be reckoned back, not from the date on which a document is filed in Court, but from the date on which, having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. It is not until the case comes on for hearing and the party producing it is called upon to prove it, that the Court, after being satisfied that it comes from proper custody, can be asked to make the presumption allowed by section 90 of The Indian Evidence Act.

Computation of period of 30 years.

On the subject of proper custody, Chief Justice Tindal made the following remarks in the case of *The Bishop of Meath* v. *The Marquis of Winchester* *:—"Documents found in a place in which, and under the care of persons with whom, such papers might *naturally and reasonably be expected to be found*, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit*. If documents continue in such custody, there never would be any question as to their authenticity but it is when documents are found in other than their proper places of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they were actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree—some being more so, some less—and in those cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases." In *Devaji Gayaji* v. *Godabhai Godbhai* (2 B. L. R. P. C. 86: 11 W. R. P. C. 35), the Lords of the Privy Council said:—"With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the bond was produced in the usual manner by the persons who *claimed title under the provisions of it*, and who therefore were entitled to the possession of it: so that the bond must be held to have come from the proper custody." See also, as to proper custody, *Srikant Bhartiacharji* v. *Raj Narain Bhartiacharji*, 10 W. R. 1: *Guru Das De* v. *Sombhu Nath Chukravatti*, 3 B. L. R. 258: *Gaur Paroi* v. *Uma Sundari Debi*, 12 W. R. 472. *Chandra Kant Mistri* v. *Brajo Nath Baisakh*, 13 W. R. 109: *Mahomed Aizaddi Saha* v. *Shaffi Mula*, 8 B. L. R. 29: *Faridunissa* v. *Ram Anoyra Singh*, 21 W. R. 19:

Proper custody.

* Bingham's New Cases, 200—202.

Ekkauri Singh Rai v. *Kailas Chandra Mukharji*, 21 W. R. 45; *Thakur Persad* v. *Basmati Koer*, 24 W. R. 428: and *Gadadhar Pal Chaudri* v. *Bhairab Chandra Bhattacharyya* I. L. R. 5 Calc. 918 (Mere production from the records of a Court not sufficient proof of custody. It must be shown that the document has been filed in order to the adjudication of some question of which that Court had cognizance and which had come under the cognizance of such Court).

In *Trailokya Nath Nandi* v. *Sarno Changini*, I. L. R. 11 Calc. 539, the defendant professed to hold under a pottah more than thirty years old in favor of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of her father's heirs, and it was held that her custody of the pottah was a natural and proper custody within the meaning of section 90 of The Evidence Act. For an exception to the rule, see section 28, Bengal Reg. II of 1819.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India][s] may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred

[s] The words in brackets were substituted for "under The Indian Succession Act" by the amending Act, XVIII of 1872.

to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill-of-exchange, the bill-of-exchange must be proved.

(*c*) If a bill-of-exchange is drawn in a set of three, one only need be proved.

(*d*) A contracts, in writing, with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment. The evidence is admissible.

See sections 64 and 65, *ante*.

Mr. Taylor reduces to *three classes* the cases falling under the rule which requires the contents of a document to be proved by the document itself, if its production be possible, *viz.*:—

I. Oral evidence cannot be substituted for any *instrument which the law requires to be in writing.*

II. Oral evidence cannot be substituted for the written evidence of any *contract which the parties have put in writing.*

III. Oral evidence cannot be substituted for any writing, *the existence or contents of which are disputed*, and which is *material to the issue* between the parties, and is not merely the memorandum of some other fact.

Class I—where the law requires writing.

The words "*in all cases in which any matter is required by law to be reduced to the form of a document,*" in the above section, indicate the first class. Instances of this class in India are:—the depositions of witnesses in civil cases (sections 182-190 of the Civil Procedure Code, Act XIV of 1882), and in criminal cases (sections 354 to 362 of the Code of Criminal Procedure, Act X of 1882); judgments and decrees in civil cases (sections 200-206 and 571-579 of the Code of Civil Procedure); judgments and final orders of

Criminal Courts (sections 367 and 424 of the Code of Criminal Procedure): the examinations of accused persons (section 364, *id.*) · an acknowledgment which extends the period of limitation (section 19 of Act XV of 1877). agreements made without consideration (section 25 of The Indian Contract Act, IX of 1872): contracts for reference to arbitration (exception 2, section 28, *id.*): an authority to incumber an under-tenure (section 16 of Act VIII B. C. of 1865): mortgages when the principal money secured is one hundred rupees or upwards (section 59 of The Transfer of Property Act, IV of 1882). leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent (section 107, *id.*): gifts of immoveable property (section 123, *id.*): wills[6] (section 50 of Act X of 1865, extended to Hindus, &c., by Act XXI of 1870): trusts of immoveable and moveable propert (section 5, Act II of 1882): *pattas* and *muchalkas* embodying the terms of tenancies in the Madras Presidency, unless both parties have agreed to dispense with them (Madras Act VIII of 1865). agreements to pay higher rent than paid in the previous years in Oudh (Oudh Rent Act, XIX of 1868, section 36); agreements by a landlord in Bengal to a division of a tenure or holding (Bengal Tenancy Act, VIII of 1885, section 88): authority to adopt a son by a talukdar in Oudh (Oudh E states Act, I of 1869, section 29). There is no Statute of Frauds in India out of the Presidency-Towns:[7] and it may seem that within those limits it applies to European British subjects only (see *Borrodaile* v. *Chinsukh Bakshiram*, 1 Jur. O. S. 70).

Deposition, &c, informally taken.

Under English law, when he written deposition of a witness or examination of a prisoner has been *informally* recorded, or when it is clearly proved that no writing was made, parol evidence of the statement made by the witness or the prisoner is admissible. The case of an informal deposition has not been specially provided for in India—But see *ante*, note to section 80. The Code of Criminal Procedure has expressly provided for aking oral evidence of the *statement made by a prisoner* when the writing is informal—see section 533, Code of Criminal Procedure, and the note to section 29, *ante*, pp. 154, 155. Section 316 of the Code of Civil Procedure provides that, when a sale of immoveable property sold in execution has become absolute, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser—that such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that date.

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[6] By section 105 of The Succession Act, *charitable bequests* must not only be in writing, but also, where the testator has a nephew or niece or nearer relative, must have been executed not less than twelve months before his death, and must have been within six months of their execution deposited in a place provided by law for the custody of wills.

[7] The Madras High Court appears to think that the Statute applies to British-born subjects in the Mufassil, see *Mattya Pillai* v. *Western*, 1 Mad. Rep. 27.

It has been held that a purchaser suing for possession of the property is not bound to produce a sale certificate, that he may prove his purchase by other evidence, and that the confirmation of the sale in his favour is sufficient to pass the title to him and is *primâ facie* evidence of his title (*Jagan Nath* v. *Baldeo*, F. B. I. L. R. 5 All. 305; *Muzafar Husain* v. *Ali Husain*, I. L. R. 5 All. 297 · *Binodi Lal Ghosh* v. *Tamizuddin*, 7 C. L. R. 115. *Raj Kishen Mukharji* v. *Radha Madhab Haldar*, 21 W. R. 349: *Dúrga Narain Sen* v. *Beni Madhab Mazumdar*, I. L. R. 7 Calc. 207 · *Tara Prasad Mytí* v. *Nand Kishor Giri*, I. L. R. 9 Calc. 842: 12 C. R. 448 *Sadagopa* v. *Jamuna Bhai*, I. L. R. 5 Mad. 55: *Velan* v. *Kumarasami*, I. L. R. 11 Mad. 296. *Tukaram* v. *Satvaji Khandrji*, I. L. R. 5 Bom. 207 *Shivram Narayan Mekal* v. *Ranji Sakharam Pradhan*, I. L. R. 7 Bom. 254. *Khushal Panachand* v. *Bhimubai*, I. L. R. 12 Bom. 589: *contra*, *Harkisandas Narandas* v. *Bai Iccha*, I. L. R. 4 Bom. 155). Section 19 of Act XV of 1877 provides that oral evidence of an acknowledgment of the period of limitation shall not be given. It has been held that this does not exclude secondary evidence of the contents of an acknowledgment which has been lost or destroyed: *Shambu Nath Nath* v. *Ram Chandra Shaha*, I. L. R. 12 Calc. 267: *Waziban* v. *Kadir Baksh*, I. L. R. 13 Calc. 292; but see *contra*, *Zialnissa Begam* v. *Motidev Ratandev*, I. L. R. 12 Bom. 268.

Class II—where the parties have put the contract in writing.

The *second* class—*viz.*, where the parties themselves have put the contract in writing,—is indicated by the words "*When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a document, &c.*" "Here," says Mr. Taylor, "the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement."[8] And Domat says:[9]—"The force of written proof consists in this men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with the view of laying down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written. Thus, contracts are written in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law as to what has been agreed on. . . The writing preserves unchanged the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves—that is, *by the inspection of the originals.*" The following cases afford instances of the application of the principle:—*Kochubhai bin Gulab Chand* v. *Krishnabai Kom Babaji*, I. L. R. 2 Bom. 635 (Secondary evidence of contents of partition deed not produced held inadmissible): *Dinamayi Deb*

[8] § 372: § 401, 8th edn.
[9] Civil Law, Book 3, Title 6, § 2.

v. *Rai Lachmipat Singh*, L. R. 7 I. A. 8 (Secondary evidence of contents of letter, the non-production of which was not satisfactorily accounted for, rejected). In all proceedings, therefore, civil or criminal, in which the issue depends in any degree upon the *terms* of a contract, if it appear from the evidence of a witness (see section 144, *post*), that such contract was reduced to writing, the party who seeks to prove such contract must either produce the instrument or show good reason for not doing so. Thus, for example, in a suit for arrears of rent, if it appear that there was a written agreement, the *rate*[1] of rent can be proved only by producing it or giving secondary evidence of its contents when such evidence is admissible.

Class III—where existence or contents of writing are disputed.

In the *third* place, oral evidence cannot be substituted for any writing *the existence or contents of which are disputed, and which is material to the issue* between the parties, and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain statements were published in a newspaper, nor as to the contents of account-books; but the newspaper and the account-books must be produced.

Admissions, orally, or by conduct.

"In stating that oral testimony cannot be substituted for any writing included in either of the three classes above mentioned," says Mr. Taylor, "a tacit exception must be made in favour of the parol admissions of a party, and of his acts amounting to admissions, both of which species of evidence are always received as *primary* proof against himself and those claiming under him, although they relate to the contents of a deed or other instrument, which are directly in issue in the cause" (§ 381; § 410, 8th edition). On this point The Indian Evidence Act introduces a stricter rule than has been followed in England, *oral* admissions of the contents of documents not being admissible as primary, but only as secondary evidence (see section 22, *ante*). *Written* admissions of the existence, condition or contents of a document are admissible under clause (*b*), section 65, *ante*, without notice and without proof of loss, &c.; but they are only *secondary* and not *primary* evidence. Clauses (*a*), (*b*), (*c*), &c., of section 65 are disjunctive.

Exceptions 1 and 2.

The first *Exception* is in accordance with English law. Due appointment may fairly be presumed from acting in an official capacity, it being very unlikely that any one would intrude himself into a public situation which he was not authorized to fill; or that, if he wished, he would be allowed to do so. With reference to *Exception* 2, it was decided in the case of *Brajanath De Sirkar* v. *Ananda Mayi Dasi* (8 B. L. R. 219) that probate of a will granted under Act X of 1865 and Act XXI of 1870 is evidence of the contents of the

[1] In *Augustien* v. *Challis* (1 Exchequer Reports, 280) *Alderson, B.*, said:—"You may prove by parol the *relation of landlord and tenant*, but without the lease you cannot tell whether any rent was due." This is doubtless law under The Evidence Act in India. See *Kedarnath Joardar* v. *Sharafunnissa*, 24 W. R. 425.

will against all parties interested thereunder. This decision turned on the interpretation of the Acts just mentioned, and was contrary to the rule previously followed: see *Sharo* v. *Baldeo Das*, 1 B. L. R. O. C. 24; and *Jaikali Debi* v. *Sibnath Chattarji*, 2 B. L. R. O. C. 1. In the case of probate granted otherwise than under the above Acts, the old rule would have prevailed but for the alteration made by the amending Act and indicated by the brackets. In connection with the subject of wills may be noticed section 208 of The Indian Succession Act, X of 1865, under the provisions of which, if a will has been lost or mislaid *since the testator's death*, or has been destroyed by wrong or accident, and not by any act of the testator, probate may be granted of a copy or the draft, if such have been preserved. By section 209, when the will has been lost or destroyed and no copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence, which, of course, includes oral evidence (see *Issar Chandra Sarma* v. *Dayamayi Debi*, I. L. R. 8 Calc. 864: 11 C. L. R. 135). Some difficulty may arise in the construction of these sections owing to the use of the words "since the testator's death" in section 208, which therefore does not provide for the case of *a will lost or mislaid during the testator's lifetime, a copy or the draft being still in existence.* The loss to which section 209 refers, is not limited by any restrictive words, and may perhaps include loss during the testator's lifetime or after his death. The result seems to be that, if a will be lost or mislaid during the testator's lifetime, and a copy or the draft be preserved, *this* secondary evidence is not admissible to prove the will; but, if there be no copy or draft, oral evidence is admissible; but this result could scarcely have been intended. In the case of *destruction* no difficulty arises, as neither section contains words restricting the meaning to destruction either before or after the testator's death.

As to *Explanation* 1, see Illustration (*a*).

Bought and sold notes.

The subject of *Bought and Sold Notes* may be noticed here. The authorities at English law seem to establish that bought and sold notes constitute the contract when they have been transmitted to the principals, when they agree, and when they have been signed so as to satisfy the Statute of Frauds. Here, it may be said, that all the circumstances indicate it to have been the intention of the parties that the writing should be the actual contract. Whether, when the bought and sold notes disagree materially, resort can be had to the broker's book, is a point upon which there has been some conflict of opinion. The question here involved is really whether the notes or the book constitute the contract. Where there is no book,[2] or where no writing is required by law, and parol evidence of the contract is offered, the question would similarly appear to be, what constitutes the contract—the notes or the oral agreement? In *Rogers* v. *Hadley*, (32 L. J. Ex. 241.) *Wilde, B.*, said:—"No doubt the bought and sold notes are *primâ facie*

[2] It is only in London that brokers are bound to keep books.

evidence of the contract between the parties, but they are not necessarily the real contract. It is still competent for the defendants to show that they were not the contract. The plaintiff has to prove not only that they were signed, but that they were signed as the contract between the parties." In a case referred by the Calcutta Court of Small Causes to the High Court, the question for decision was whether parol evidence was admissible where there was a variance between the bought and sold notes. *Couch, C. J.*, said :—"It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence or terms of a contract on which he could maintain the action. In *Sievewright* v. *Archibald* (17 Q. B. 103) a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Mr. Justice Erle's opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree was in accordance with that of the other Judges. Mr. Justice Patteson says :—'I consider that the memorandum need not be the contract itself but that a contract may be made without writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the Statute is satisfied,'—and the ground of his judgment is, that where the bought and sold notes are the only writing, and they differ materially, the Statute is not satisfied. Lord Campbell says :—'I by no means say that where there are bought and sold notes they must necessarily be the only evidence of the contract. Circumstances may be imagined in which they might be used as a memorandum of a parol agreement . . . . What are called the bought and sold notes were sent by him (the broker) to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them . . . In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part-acceptance or part-payment, the Statute of Frauds has not been complied with; and I agree with my brother Patteson in thinking that the defendant is entitled to the verdict.' There may be a complete binding contract, if the parties intend it, although bought and sold notes are to be exchanged, or a more formal contract is to be drawn up. This is shown by *Heyworth* v. *Knight* (38 L. J. C. P. 298). If the bought and sold notes do not agree, they cannot be used as evidence of the contract, but we cannot agree with the First Judge that their differing, and not being returned, is positive evidence that, at the conclusion of the negotiation, the parties did not agree, the fact being, as I think, that the negotiation was concluded, and the contract made, before the notes were written and they were sent by the broker to his principals by way of information. To support the opinion of the First Judge, it would be necessary that there should exist a custom between merchants

that they should not be bound until regular bought and sold notes have been exchanged" (*Clarton* v. *Shaw*, 9 B. L. R. 245).[3] In *Ralli* v. *Caramalli Tazal*, I. L. R. 14 Bom. 102, certain bought and sold notes were held inadmissible in evidence because the stamps on them had not been properly cancelled, and it was said that as the terms of the contract had been reduced to writing under this section, no evidence except the documents themselves could be given in proof of it. Similarly, in *Jadu Rai* v. *Bhubotaran Nandi*, I. L. R. 17 Calc. 173, it was held that the bought and sold notes interchanged must be held to be the final expression of the agreement between the parties, and that no evidence was admissible to add to or vary the terms of the notes.

As to *Explanation* 2, see Explanations 1 and 2, section 62, *ante*.

In connection with *Explanation* 3, read Illustrations (*d*) and (*e*). In the first case here put, the incidental mention of what was done on another occasion had nothing to say to the *terms* of the contract embodied in writing. In the second case, the writing was merely a memorandum of the fact of payment, and oral evidence of the payment is therefore admissible: *Dalip Singh* v. *Durga Prasad*, I. L. R. 1 All. 442; *Venkayyar* v. *Venkatasubbayar*, I. L. R. 3 Mad. 53. It may be useful to give a few more examples, it being more difficult to determine when the writing may be dispensed with than when it must be produced. If, during an employment under a written contract to repair the inside of a house, an order be given verbally for additional and distinct repairs or work on the outside of the house, the writing need not be produced in an action to recover for the latter. If the fact of the occupation of land be in issue without respect to the terms of the tenancy, this fact may be proved by parol evidence, such as payment of rent, or by the evidence of a witness who has seen the tenant occupy, notwithstanding that the occupancy be under a written agreement. See, for example, *Kedarnath Joardar* v. *Sharafunissa*, 24 W. R. 425, and note to p. 420. In the note to section 65 (*ante*, p. 387) it has been already pointed out that in certain circumstances secondary evidence may be given of a contract, the terms of which have been embodied in a document, which cannot be produced in evidence in consequence of its being insufficiently stamped. So, too, it has been held that a *Sodi Razinama*, (that is, a document whereby a party relinquishes his right of occupancy of land in his possession to his landlord and requests the latter to register the land in the name of another party to whom it has been sold,) though it cannot be received in evidence for want of registration, is yet not a document of the kind mentioned in section 91 of The Evidence Act, and therefore does not exclude the Courts from basing their findings upon other evidence, should any exist: *Venkatesa* v. *Sengoda*, I. L. R. 2 Mad. 117. Partnership may be proved by parol evidence of the acts of the parties without producing the written deed of partnership. So, the fact of birth,

When oral evidence of facts mentioned in a document may be given

[3] See also Taylor, §§ 300—303; §§ 420—423, 8th edn.

baptism, marriage, death, or burial may be proved by oral testimony notwithstanding the existence of registers of these occurrences; for, says Mr. Taylor, these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact.

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

A to whether oral evidence is admissible to show that a person, who has made a contract in his own name, is merely an agent for an undisclosed principal, see *Supromonian Setty* v. *Hellgers*, I. L. R 5 Calc. 71. As to the converse, see *Kumara* v. *Srinivasa*, I. L. R. 11 Mad. 213.

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want [or][4] failure of consideration, or mistake in fact or law.

See, as to the rectification of instruments erroneously drawn through fraud or mistake, Chapter III of The Specific Relief Act, I of 1877.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

See section 132 of The Indian Contract Act, IX of 1872.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

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[4] The word in brackets was substituted for "of" by section 8 of the amending Act, XVIII of 1872.

Proviso (1).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(*b*) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March 1873 The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March cannot be proved.

(*c*) An estate called 'the Rampur tea estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(*d*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

(*e*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired

(*g*) A sells B a horse and verbally warrants him sound A gives B a paper in these words 'Bought of A a horse for Rs 500' B may prove the verbal warranty.

(*h*) A hires lodgings of B, and gives B a card on which is written —'Rooms, Rs 200 a month' A may prove a verbal agreement that these terms were to include partial board

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them It is silent on the subject of board A may not prove that board was included in the terms verbally

(*i*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money In a suit for the amount A may prove this

[See Illustration (*e*), section 91, *ante*.]

(*j*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it A may show the circumstances under which it was delivered

The language of this section is not quite free from ambiguity. The words "*No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument*, &c." correspond with and have clear reference to the words "*contract, grant, or other disposition of property*" in the beginning of the section; but their application to "*any matter required by law to be reduced to the form of a document*" is not so evident If the matter required by law to be reduced to writing be a deposition, for example, evidence of an oral statement appears to be admissible for the purpose of contradicting the writing in cases other than those included in the provisoes that follow. See *ante*, as to the words "shall presume," section 80 and the note thereto. See also Illustrations (*a*) and (*b*) to section 121, *post*.

Persons not parties may give oral evidence

Oral evidence to contradict, vary, add to, or subtract from the terms of the writing, is excluded only as *between the parties to the instrument or their representatives in interest* Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (section 99, *post*). But can such persons give evidence to *contradict, add to, or subtract from* the writing? If section 99 had not been inserted in the Act, this evidence would clearly be admissible, inasmuch as section 92 excludes it only as *between parties, &c.*, but it may be said that

the use of "*varying*" only in section 99 and the omission of "*contradicting, adding to, or subtracting from*" point to the admission of oral evidence when tendered by persons not parties in the case expressed, and to its exclusion in the cases omitted—*Expressio unius personæ, vel rei, est exclusio alterius.*

Illustrations (*a*), (*b*), and (*c*) afford instances of oral evidence which would contradict the writing and which would therefore be inadmissible.

Reasons for excluding oral evidence.

The rule that *parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument*, is founded on the obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties were liable to be controlled by what Lord Coke expressively calls *the uncertain testimony of slippery memory.* So Starkie says:—"It is likewise a general and most inflexible rule that, wherever written instruments are appointed either by the requirements of the law, or *by the compact of parties*, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy: of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence: *of policy*, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by *loose collateral evidence*. . . . Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists for the purpose of evidence."

Exceptions to the rule.

This rule is, however, not infringed by the admission of parol evidence under the proper plea to show that the instrument is altogether void, or that it *never* had any legal existence or binding force either by reason of forgery or *fraud*, or for the *illegality* of the subject-matter, or for a want of due execution and delivery: or to show that the writing was obtained by duress, or that the party was incapable of binding himself by reason of some legal impediment, such as infancy coverture, idiotcy, insanity, or intoxication. The want or failure of consideration may also be proved by parol; and if no consideration is stated, one may be proved by extrinsic oral evidence. "The same general rule prevails in equity, as at law," says Mr. Story,[5] "that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments: and that the interpretation of them must depend upon their own terms. But in cases of *accident, mistake, or fraud*, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments.

[5] Equity Jurisprudence, Vol. II, page 750, § 1531.

These and other exceptions to the rule are embodied in the *provisoes* to the section.

There was a course of decisions in Bengal which seemed more or less to favour the position that oral evidence could be admitted to show that an instrument, purporting on the face of it to be a deed of absolute sale, was really intended by the parties to operate as a mortgage merely, in consequence of there being a contemporaneous oral agreement that the property should be reconveyed on repayment with interest of the money which formed the consideration for the conveyance. How far this view was really warranted by the cases relied on in support of it, is now immaterial, as the law is no longer doubtful. It will, however, be useful to refer to the case (*Kashinath Chakracartti* v. *Chandi Charan Banarji*, 5 W. R. 68) which finally settled the law and established the principle which has been incorporated in The Indian Evidence Act. *Peacock, C.J*, in whose opinion the majority of the Full Bench concurred, said :—"I am of opinion that verbal evidence is *not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import.* If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that, at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mufassil without writing. . . . . But, admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses, and was intended to express. . . . . Without holding that every rule of the English Law of Evidence is to be applied to transactions in the Mufassil, I have no hesitation in saying that a rule of evidence, allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to the grossest fraud, and would open the widest door to perjury in support of fraud. . . . . If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case; and a man who writes '*one thousand*' intending to write '*one thousand*' might prove that, by a verbal agreement, the words '*one thousand*' were not intended to mean '*one thousand*' but only '*one hundred*.' Nothing could be more dangerous than the admission of such evidence. Further, if it be held that such evidence is admissible, *the whole effect of the new Registration Act would be frustrated.* If an absolute deed

Conveyances in Bengal alleged to have been intended to operate as mortgages merely.

of sale of land is registered, it could not be controlled or proved to be conditional by an unregistered *ekrarnamah*, because both are instruments relating to land within the meaning of Act XVI of 1864, section 13; but a mere verbal contract would not be an instrument within the meaning of that section. If an absolute deed of sale could be controlled or modified by a contemporaneous verbal agreement, showing that it was intended to be a mortgage, an absolute deed of sale of land registered could be modified by an unregistered verbal agreement, as a verbal agreement cannot and is not required to be registered. This does not necessarily show what the law is; but it behoves us, in deciding this case, not to admit a principle which must necessarily lead to such results, unless we find it clearly and unequivocally established. . . . . I do not know that the Hindu or Mahomedan law allows a written document to be altered by contemporaneous verbal statements. It is unnecessary to enter into that question here. It is sufficient to say that, if they did, we are not bound by the Mahomedan or Hindu rules of evidence, and that they were far more stringent than ours. . . . . The plaintiff in the present case alleged that he took possession in 1266, and that in 1270 the defendant forcibly dispossessed him. The defendant says that plaintiff never took possession, and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill-of-sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and forcibly dispossessed, as alleged by him, and whether, having reference to the amount of the alleged purchase money advanced, and to the value of the interest alleged to be sold, *and the acts and conduct of the parties*, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only; for I am of opinion that *parol evidence is admissible to explain the acts of the parties*, as for example, to show why the plaintiff did not take possession in pursuance of the bill-of-sale, if it be found that the defendant retained possession, and that the plaintiff never had possession, as alleged by him, and was never forcibly dispossessed." The case was accordingly remanded to the lower Court that it might consider certain acts and conduct of the parties, and with reference to them determine whether the transaction was an absolute sale or a mortgage. With reference to this order it was observed, in a subsequent case, that there may be some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all, are only indications of such unexpressed unwritten agreement between the parties (*Madhab Chundra Rai* v. *Gungadhar Samant*, 11 W. R. 450: 3 B. L. R. 86). Presumably, however, this evidence of conduct was admitted not so much to vary or contradict the written instrument as to show that the parties had mutually *waived* the contract embodied in the writing, or that the writing was not really the contract—see the case at 7 Mad. H. C. Rep. 189, and authorities there quoted. The report shows that a considerable

period had elapsed, and that several transactions had taken place between the execution of the writing and the suit brought. See also *Phelu Mani Dasi* v. *Girish Chandra Bhattacharjya*, 8 W. R. 515: *Parabdi Sahani* v. *Mohamed Hossein*, 1 B. L. R. A. C. 37: *Bholanath Khettri* v. *Kali Prasad Agarwala*, 8 B. L. R. 89: *Mati Lal Sil* v. *Anand Chandra Sandel*, 5 Moo. I. A. 72: *Shah Malhan Lal* v. *Sri Krishna Singh*, 2 B. L. R. P. C. 44: *Cutts* v. *Brown*, I. L. R. 6 Calc. 328: 7 C. L. R. 171: and *Nando Lal Mitra* v. *Prasanno Mayi Debi*, 19 W. R. 333, in all of which cases parol evidence was held admissible. On the other hand, see *Ram De Koer* v. *Bishen Dyal Singh*, 8 W. R. 339: *Madhab Chandra Rai* v. *Ganadhar Samanto*, 11 W. R. 450: 3 B. L. R. 86: *Ram Dulal Sen* v. *Radhanath Sen*, 23 W. R. 167 and *Banapa* v. *Sundardas Jagjivandas*, I. L. R. 1 Bom. 333: *Moran* v. *Mitto Bibi*, I. L. R. 2 Calc. 58: *Ram Dayal Bajpai* v. *Hira Lal Paray*, 3 C. L. R. 386: *Bhagbati Dai* v. *Bholanath Thakur*, L. R. 2 I. A. 256: and *Daimudin Paik* v. *Kam Faridar*, I. L. R. 5 Calc. 300: 4 C. L. R. 419 in which last cited case it was held that the case of *Kashinath Chatarji* v. *Chandi Charan Banarji* must be considered to be overridden by section 92 of The Evidence Act.

The principle and its application have more recently been discussed in the cases of *Hem Chandra Sur* v. *Kali Charan Das*, I. L. R. 9 Calc. 528: 12 C. L. R. 287 *Hukum Chand* v. *Hira Lal*, I. L. R. 3 Bom. 159: *Baksu Lakshman* v. *Govinda Kanji*, I. L. R. 4 Bom. 594 *Hasha Khand* v. *Jesha Premaji*, I. L. R. 4 Bom. 609: *Kashinath Das* v. *Harihar Mukharji*, I. L. R. 9 Calc. 898: *Govinda* v. *Jeshá Premaji*, I. L. R. 7 Bom. 73: *Bihari Lal Das* v. *Tej Narain*, I. L. R. 10 Calc. 764: *Venkatratnam* v. *Reddiah*, I. L. R. 13 Mad. 491 *Rakkan* v. *Alagappudayan*, I. L. R. 16 Mad. 80. In *Baksu Lakshman* v. *Govinda Kanji*, which was a suit brought to eject the defendants, the property being claimed by the plaintiff by virtue of an instrument of sale, the defendants alleged that there was a contemporaneous oral agreement that the contract should be treated as one not of sale but of mortgage. The Subordinate Judge in the Court below held the oral agreement to be proved partly by direct parol evidence and partly by the conduct of the plaintiff, which was consistent with the character of a mortgagee but inconsistent with that of a purchaser. On appeal, *Melville, J.*, observed: "There is no doubt that under the circumstances stated by the Subordinate Judge, the Court of Chancery would admit parol evidence of the oral agreement, and would restrain the plaintiff from prosecuting his action of ejectment. The question which we have to determine is whether the provisions of sections 91 and 92 of The Indian Evidence Act preclude a Court of Equity in this country from exercising the same remedial jurisdiction. The result of the most recent decisions of this Court appears to be that, although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill-of-sale, there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties; and if it clearly appear, from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage

and nothing more. The same distinction between direct parol evidence of an oral agreement and evidence of subsequent conduct was drawn and given effect to by the Calcutta High Court in the Full Bench case (*Kashinath Chatarji* v *Chandi Charan Banarji*, 5 W R. 68)." After dissenting from *Damudin Park* v. *Kaim Faridar*, *Melvill, J.*, proceeded —"The Indian Evidence Act contains in the sections referred to the rule of the English Common Law, very slightly modified by equitable considerations. But when subsequently dealing with the equitable jurisdiction of our Courts, the Legislature has shown the clearest intention to relax the provisions of those sections. Section 26, clause (c) of The Specific Relief Act would undoubtedly enable a defendant in a suit for specific relief to prove an oral agreement for re conveyance, in bar of the plaintiff's conveyance If our Courts are to exercise this equitable jurisdiction in one description of action, it is hardly to be supposed that the Legislature does not intend them to exercise it in the other cases, merely because the form of action is different. The rule which on a consideration of the whole matter appears to me most consonant both to the Statute law and to equity and justice is this, namely, that a party whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakably from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale; and thereupon if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement. As was observed by *Wigram, V C.*, in *Dale* v. *Hamilton* (5 Hare, 381), and also by *Jessel, M. R.*, in *Ungley* v. *Ungley* (L R. 5 Ch Div. 887), the conduct of the parties shows that some contract reconcileable with such conduct must have taken place between the litigant parties; and the Court is consequently compelled to admit evidence of the terms of the contract in order that justice may be done between the parties." These observations of *Melvill, J*, were approved of by *Garth, C. J*, in *Hem Chandra Sur* v. *Kali Charan Das*, 1 L. R 9 Calc. 528, 12 C. L R. 287, in which it was held that section 92 of The Evidence Act made no change in the law as laid down in *Kashinath Chatarji* v. *Chandi Charan Banarji*, but is in accordance with what was decided in that case, and in which *Ram Dogal Bajpai* v. *Hira Lal Paray* and *Damudin Park* v. *Kaim Faridar* were expressly dissented from. Similarly in *Kashinath Das* v. *Haribar Mukharji*, I. L. R. 9 Calc. 898, it was held that it does not necessarily follow from section 92 of The Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what, on the face of it, is a conveyance, is really a mortgage. In *Ram Baksh* v *Duryan*, I. L. R. 9 All. 392, which was a suit upon a hypothecation bond payable by instalments, it was pleaded that at the time of the execution of the bond an oral agreement was made that the plaintiff was to have possession of certain land

which was included in the hypothecation until the amount due on the bond should have been liquidated from the yearly rent of the land; that under this agreement the plaintiff obtained possession of the land and received the rents, and that in this way the whole amount due had been realized. It was held that this oral agreement was not one which detracted from, added to, or varied, the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence. But in *Ebrahim Pir Mahomed* v. *Cursetji Sorabji Deoitre*, I. L. R. 11 Bom. 614, which was a suit for ejectment, in which the defendant pleaded that there was an oral agreement between him and his lessors that he should be entitled to a renewal of the lease for three years, it was held that evidence of this oral agreement was inadmissible, as it was inconsistent with the terms of his lease, which provided for the defendants giving up possession of the premises on receiving a month's notice to quit. So, in *Cowasji Ruttonji Limboowalla* v. *Burjorji Rustomji Limboowalla*, I. L. R. 12 Bom. 335, in which the executors of a deceased partner of a firm granted a release to the remaining partner from all claims on payment of a certain lump sum, it was pleaded by an assignee from the executors that there had been an oral agreement that in addition to the lump sum, the executors should receive a one-anna share in the partnership. It was held that evidence that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release.

Questions between parties on the one side *inter se*.

In *Mulchand* v. *Madho Ram*, I. L. R. 10 All. 421, it was pointed out that the words in this section "between the parties to any such instrument" refer to the persons who on the one side and the other come together to make a contract; but do not apply to questions raised by parties on the one side *inter se*, and not affecting the other party to the contract touching their relation to each other in the transaction, and that therefore they do not preclude one of two persons in whose favour a deed of sale purports to have been executed from proving by oral evidence in a suit by the one against the other that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff is solely entitled to the property conveyed by it.

Proviso (1.)

In connection with *Proviso* (1) should be read Illustrations (*d*) and (*e*). The latter throws light on the words "*or which would entitle any person to any decree or order relating thereto.*" In *Cutts* v. *Brown* (I. L. R. 6 Calc. 328: 7 C. L. R. 171) the plaintiffs sued for specific performance of an agreement in writing, which recited that the defendants had agreed to sell under "certain conditions as agreed upon." The defendants contended that the written agreement did not contain the whole of the conditions, and it was held that parol evidence was admissible to show what was meant by "certain conditions as agreed upon." Where neither party to the contract is in error as to the matters in respect of which they are contracting, but there is a mutual error in the reduction of the contract into writing, there the Court interferes for the purpose

of *reforming* the contract and not of *rescinding* it.[6] As to *mistake*, see also sections 20, 21, and 22 of The Indian Contract Act, IX of 1872: and *Dhanpal Singh Dugar* v. *Jawahir Ali*, 8 W. R. 152, a case to be distinguished from Illustration (*c*). As to *fraud*, see section 17, read with sections 14 and 19, of The Indian Contract Act: section 48 of The Indian Succession Act, X of 1865: *Manohar Das* v. *Bhagabati Dasi*, 1 B. L. R. O. C. 28 (Fraud on a *pardanishin* lady): *Mathura Pandey* v. *Ram Rucha Tewari*, 3 B. L. R. A. C. 108: and *Shah Makhan Lal* v. *Srikrishna Singh*, 2 B. L. R. P. C. 49 (A party cannot show true nature of transaction by proof of fraud for his own relief, and insist on its apparent character to prejudice his adversary—cannot approbate and reprobate). This was followed in *Himmat Sahai Singh* v. *Llewhellen*, I. L. R. 11 Calc. 486, in which the plaintiff sued on a *patowa* lease which recited that a sum of Rs. 2,000 had been paid by the defendant to the plaintiff as a bonus. The plaintiff sued to recover Rs. 1,850, alleging that only Rs. 150 had been paid and not Rs. 2,000 as recited in the *patowa*. The defendant admitted that Rs. 850 was due, and as to the remaining Rs. 1,000 alleged that at the time of the transaction it was agreed that the sum of Rs. 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence to the agreement set up by the defendant was inadmissible, but it was held that as it was open to the plaintiff under proviso 1 of section 92 of The Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid, it was equally competent to the defendant in answer to such case to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. In *Banapa* v. *Sundardas Jugjivandas*, I. L. R. 1 Bom. 338, it was pointed out that the fraud referred to in this proviso must be contemporaneous fraud, and *Garth, C. J.*, in *Cutts* v. *Brown*, I. L. R. 6 Calc. 328: 7 C. L. R. 171, has said that this proviso seems to apply to cases where evidence is admitted to show that a contract is void or voidable or subject to reformation upon the ground of fraud, duress, illegality, &c., in its inception, and not to cases where, the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it against the other. But in *Baksu Lakshman* v. *Govinda Kanji*, I. L. R. 4 Bom. 608, *Melvill, J.*, observed that the jurisdiction of the Courts to admit parol evidence of conduct of the parties to show that an apparent sale was really a mortgage rested on the basis of fraud, and that the words of the first proviso to section 92 were very wide and declared that any act of fraud might be proved which would entitle any person to any decree relating to a document, and that it was not clear that these words were not large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. In *Kashinath Chakravartti* v. *Brindaban Chakravartti*, I. L. R. 10 Calc. 649, the

[6] Fry on Specific Performance, page 222, § 500.

plaintiff sued to recover rent under a kabuliyat. The defendant admitted execution of the kabuliyat, but pleaded that he was himself the owner of the land, and he had in collusion with the plaintiff given him this kabuliyat in order that he might sell the land to some third person for a high price, paying the defendant Rs. 282 out of the price and obtaining also for him from the purchaser a *maurasi* pottah for the homestead land. It was held that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties. In *Jaggernath Sew Baksh* v. *Ram Doyal*, I. L. R. 9 Calc. 791, which was a suit on a contract for the sale and purchase of Government paper, it was held that, as the contract was unambiguous in its terms, oral evidence to prove that it was a wagering contract and void under section 30 of The Indian Contract Act or contrary to public policy under section 23 of the Act was not admissible. But in *Anup Chand* v. *Champsi Uger Chand*, I. L. R. 12 Bom. 585, it was held that in such a case such evidence was admissible, and it was observed that in *Jaggernath Sew Baksh* v. *Ram Doyal* the effect of proviso 1 to section 92 did not appear to have been considered.

As to *intimidation*, see section 15 of The Indian Contract Act and section 18 of The Indian Succession Act.

As to *illegality*, see sections 23 and 24 of The Indian Contract Act; section 114 of The Indian Succession Act; and section 43 of the Indian Penal Code. As to *want of capacity*, see sections 11 and 12 of The Indian Contract Act. As to *want or failure of consideration*, see section 25 of The Indian Contract Act: Illustration (a) above; *Chaudhri Debi Persod and Beni Persad* v. *Chaudhri Daulut Singh*, 3 Moo. I. A. 347 (Statement in deed of compromise of payment of consideration not conclusive): and *Ramdi Kunwari* v. *Sibdayal Singh*, 7 W. R. 334, which last case is no longer law.

Under this proviso it may be shown that an acceptor of a bill never had any consideration for it, and that he accepted it for the accommodation of the drawer or some other party: *Pogose* v. *The Bank of Bengal*, I. L. R. 3 Calc. 184. Where a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-12-0 and Rs. 36-4-0 in cash, it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being "ready money received" (*Hukum Chand* v. *Hira Lal*, I. L. R. 3 Bom. 159).

With *Proviso* (2) should be read Illustrations (*f*), (*g*), and (*h*). The last exemplifies *formality* and the absence thereof. Where a promissory note was silent as to interest, a subsequent verbal agreement for the payment of interest was allowed to be proved (*Saudamani Debi* v. *Spalding*, 12 C. L. R. 163: *Umesh Chandra Bania* v. *Mohini Mohan Das*, 9 C. L. R. 301). See also *Mohun Lal Rai* v. *Annapurna Dasi*, 9 W. R. 567, in which oral evidence was admitted to show the boundaries of land let under a *patta* which contained no

Proviso (2).

boundaries, and *Bikari Lall De* v *Kamini Sundari*, 14 W R 319 in which it was held that oral evidence was admissible when the parties had not intended that the writing should contain the whole agreement between them, which might be proved either by direct evidence or be apparent from informality in the writing In *Himmat Sahai Singh* v. *Dileshelli*, I L R. 11 Calc. 486, it was said that under this proviso oral evidence was admissible to show that although the consideration was fixed at Rs. 2,000 there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs. 1,000, on account of a debt due by his relative, the stipulation as to the refund of the Rs. 1,000 not being inconsistent with the recital as to the consideration in the contract See also *Mayen* v. *Alston* I. L. R. 16 Mad 238.

With *Proviso* (3) read Illustration (*f*). An *escrow* is a writing deposited with a third person to be by him delivered to the person whom it purports to benefit upon the performance of some condition, upon which only the writing is to have effect. In *Mahsan Ali* v *Balasu Koer* (Hay's Rep. 577), it was held that where a deed of sale of a portion of an estate was delivered *to the party in whose favour it had been executed*, evidence could not be admitted to show that it was intended to operate as an escrow only, as might have been the case had it been delivered to a *third party*. The report of this case is not very clear, and the decision would seem not to be in accordance with *Pym* v. *Campbell*, 25 Law Journal, Q B 277 and *Davis* v. *Jones*, 17 Com. Bench Rep. 625, which are followed in the above *Proviso*. An important example of the application of the principle will be found in *Guddalur Ruthna Mudaliyar* v. *Kumathai Annamuga Mudaliyar*, 7 Mad. H C Rep 189. See also *Jagla Band Misser* v. *Neighan Singh* (I. L. R. 6 Calc 433), where it was said that the rule cannot apply to a case where the written agreement has not only become binding, but has actually been performed as to a large portion of its obligations and *Tiruvengada Ayyangar* v. *Rangasami Nayak*, I L. R. 7 Mad. 19.

Proviso (3)—Escrow

Proviso (4) modifies (as regards the matter with which it deals) the law as stated in *Kashi ath Chakravarti* v *Chandi Charan Banarji* (*ante*, page 428) and by Lord Denman in *Goss* v. *Lord Nugent*,[7] who said:—"After an agreement has been reduced into writing, it is competent to the parties at any time before breach of it *by a new contract not in writing*, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement" Where writing is by Statute required for the new contract, of course it must be in writing. But where writing is not required for the *new contract*, the mere fact of its being necessary for the *old contract* rescinded or modified will not necessitate the new contract being written.

Proviso (4)

[7] 5 Barnwall and Adolphus' Reports, 65.

Under the above proviso, however, the new contract cannot be a verbal one in cases in which the old contract (1) is by law required to be in writing, or (2) has been registered.—*Nihil tam conveniens est naturali æquitati quam unum quodque dissolvi eo ligamine quo ligatum est.*[a] See the rule applied in *Umedmal Motiram* v. *Dava bin-Dhondiba*, I. L. R. 2 Bom. 547.

But in *Rakhmabai* v. *Tukaram*, I. L. R. 11 Bom. 47, in which the defendant claimed certain property as a preferential heir and also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the plaintiff, it was held that evidence of this defence was admissible, the object of the oral agreement not being to rescind the original transaction, but to transfer any rights acquired by the plaintiff to the defendant, and was an entirely new transaction. See also *Herambdev Dharanidhar Dev* v. *Kashinath Bhaskar*, I. L. R. 14 Bom. 472. In *Vasudeva* v. *Narasamma*, I. L. R. 5 Mad. 6, the defendant pleaded that the consideration of a registered deed of sale executed by her husband was not Rs. 300 as recited therein, but the marriage of her daughter to the plaintiff. The lower Court held that under this proviso the defendant was prohibited from proving this plea, but the Judges of the Madras High Court held that evidence of this plea might be adduced. The case of *Autu Singh* v. *Ajudhia Sahu*, I. L. R. 9 All. 249, is another case in which, though the first contract was registered, evidence of a subsequent oral agreement was admitted on the ground that it did not really rescind or modify it.

Proviso (5).—The rule of annexing incidents by parol is generally applied in mercantile or other dealings, in which *known usages* prevail, with reference to which the parties are presumed to have contracted. It also rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter. If, therefore, the written contract contain express provisions on the subject of the usage or custom, parol evidence will be inadmissible, as this would vary or alter the writing. With reference to mercantile usage, see *ante*, pages 110, 111: *Jago Mohan Ghosh* v. *Kaisrichand*, 9 Moo. I. A. 260 (Neither by the English nor the Hindu law, unless there be mercantile usage, can *interest* be imported into a contract which contains no stipulation to that effect): *Kunj Bihari Patak* v. *Shiva Balak Singh*, 1 N.-W. P. Rep. Full Bench, 119 (Custom of digging wells, &c.): *The Bank of Hindustan, China, and Japan* v. *Sedgwick and Bulkly*, I. Jur. N. S. 107 (Promissory note—stamp—usage): *Indra Chandra Dugar* v. *Lachmi Bibi*, 7 B. L. R. 682 (Evidence of custom as to *hundi* excluded by express terms of writing): *Muefarlane* v. *Carr*, 8 B. L. R. 459 (Custom at variance with contract): and *Hari Mohan Baisakh* v. *Krishno Mohan Baisakh*, 9 B. L. R. App. 1 (*Hundi*—

Proviso (5).

[a] "Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound."

local custom at Dacca): *Smith* v. *Ludha Ghelle Damodar*, I. L. R. 17 Bom. 129 (Alleged usage of delivery to railway at inland town being equivalent to shipment on board ship at seaport town).

With reference to the use and value of this evidence, the following observations of Mr. Justice Story are important:—"I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade to control, vary, or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-selected principles of law: and I rejoice to find that, of late years, the Courts of Law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs and to discountenance any further extension of them. *The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.* It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied." (See section 98, *post*.) "But I apprehend that it can never be proper to resort to any usage or custom to control or vary positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties." The Indian Evidence Act adopts the principles here advocated.

Proviso (6).

As to *Proviso* (6), if a man purchase "the Rampur estate" or "Mr. Smith's house in Calcutta," or "the steamer Hindustan" or "the racehorse Jupiter," without further words of description, oral evidence alone can show the particular thing sold and purchased. See *Umesh Chandra Mukharji* v. *Sageman*, 5 B. L. R. 633, in which a letter had been addressed by the defendant to a Mrs. White containing an acknowledgment of the debts, and it was held that evidence was admissible to show that Mrs. Sageman, the defendant, was known as Mrs. White, and also for the purpose of identifying the debt to which the acknowledgment referre

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a*) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.' Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

This is what has been known from the time of Lord Coke as a *patent ambiguity* or an ambiguity apparent on the face of the instrument, as distinguished from a *latent ambiguity*, which, non-apparent on the face of the instrument, comes to light only when the language of the writing is sought to be applied to existing facts. So, agreements, the meaning of which is not certain or capable of being made certain, are void—section 29 of The Indian Contract Act, IX of 1872. In *Deojit* v. *Pitambar*, I. L. R. 1 All. 275, certain persons describing themselves as residents of Jarao Bas Mohan had given a bond for the payment of money in which as collateral security they had pledged "their property with all the rights and interests." It was held that the hypothecation in the bond was of too general a nature to admit of a decree being given against any particular property of the defendants, and the language of the deed being ambiguous, no evidence could be given to make it certain.

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B by deed 'my estate at Rampur containing 100 bighas.' A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Such evidence, if admitted, would contradict the writing.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

The legal maxim is—*falsa demonstratio non nocet*—a false description does not vitiate the document: and the principle is, that so much of the description as has no application being laid aside as mere surplusage, what remains is sufficient to identify the thing really meant. The words "in Calcutta" in the *Illustration* have no application. The words "my house" have application, when it is shown that A had a house at Howrah. This is a case of *latent ambiguity*. In cases of this kind, evidence of conduct is of great value. As to such evidence, see *ante*, note to section 8. When a sale certificate described as a *jotedari interest* what was really a *shikmi taluk*, this misdescription was held not to prejudice the purchaser's title (*Kalimudin Darogah* v. *Ashraf Ali Khan*, 19 W. R. 276: *Taranath Chakravartti* v. *Jai Sundari Debi*, 21 W. R. 93).

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustration.

(*a*) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b*) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Deccan or Haidarabad in Sindh was meant.

This also is a case of *latent ambiguity*.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the

occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

This is another case of *latent ambiguity*. A further illustration is afforded by a class of cases, which not unfrequently occur in India where there is a description of land in a conveyance, lease, or other document, such a description setting forth the boundaries and then specifying the quantity, as so many acres, *bighas* or the like. Here the maxim *falsa demonstratio non nocet* applies it is considered to be a mere false description, if there is an error in the quantity: and the land within the boundaries passes by the conveyance or lease, whether it be less or more than the quantity specified (see *Pahalwan Singh* v. *Mahessur Baksh Singh*, 9 B. L. R. P. C. 169: 16 W. R. P. C. 5. *Modhudin Joardar* v. *Sandes*, 12 W. R. 439: *Shib Chandra Mahmah* v. *Brojanath Aditya*, 14 W. R. 301: *Abdul Mannah* v. *Baroda Kant Banarji*, 15 W. R. 394: *Zinat Ali* v. *Ram Dyal*, 18 W. R. 25: *Ishan Chandra Ghosh* v. *Pratab Chandra Rai*, 20 W. R. 224. *Varjivandas Madhavdas* v. *Mahomed Ali Khan Ibrahim*, I. L. R. 5 Bom. 208 *Llewellyn* v. *The Earl of Jersey*, 11 M. & M. 189: *Whitfield* v. *Langdale*, L. R. 1 Chan. 61; Kent's Commentaries, Vol. IV, section 466: 2 Smith's Leading Cases, 523; and Taylor, §§ 1104 and 1105; §§ 1220 and 1221, 8th edn).

Land passes by boundaries—misstatement as to area immaterial.

Mr. Taylor collects from the cases decided under English law the following rules:—*First*, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subject was intended by the author. *Secondly*, if the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible. *Thirdly*, if the *description be partly correct and partly incorrect*, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement. *Fourthly*, if the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe. *Fifthly*, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect." (§ 1109; § 1226, 8th edn.) Rule I, here given, corresponds with section 96; Rule II, with section 97: Rules III and V correspond with section 95, and Rule IV

English Law.

corresponds with section 94: while no distinction appears to be made in any case between *declarations of intention* and other evidence.

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to B 'all my moulds.' A has both moulds and modelling tools. Evidence may be given to show which he meant to sell.

In connection with this section, see the penultimate clause of section 49, *ante*. The Illustration is the case of *Goblet* v. *Beechey* (3 Simons's Chancery Reports, 21), where it was held that moulds were meant. A grant by a certain Raja was dated "25th Phalgun in the year 16." It was held that the meaning of the words "in the year 16" might be shown by reference to another grant signed by the same official whose signature was affixed to the grant in dispute, from which it appeared that the year 37 "meant the thirty-seventh year of the Raja," and that it corresponded with 1168, B. S. (*Equitable Coal Company* v. *Gonesh Chandra Banarji*, 11 C. L. R. 276.)

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

Query—Was the use of the single term "varying" intended to exclude evidence *contradicting*, &c.? (See *ante*, p. 426.)

Saving of Provisions of Indian Succession Act relating to Wills.

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of The Indian Succession Act (X of 1865) as to the construction of Wills.

The provisions of The Indian Succession Act as to the construction of Wills are contained in Part XI, sections 61 to 98, inclusive.

With section 100 ends Part II, Chapters V and VI, relating to documentary evidence. There are, however, a few other points connected with documents which it may be convenient to notice. In interpreting the Acts of the Indian Legislatures, it will be well to bear in mind the provisions of the General Clauses Acts, passed for the purpose of shortening the language used in Acts of those Legislatures. These are—Acts I of 1868, I (M. C.) of 1867, X (Bom. C.) of 1866, and V (B. C.) of 1867. As to Acts of Parliament, see 13 & 14 Vict. cap. 21.

General Clauses Acts.

The Evidence Act provides for certified *copies* of public documents. Cases, however, may arise in which it may be necessary or advisable to inspect the *originals*. Section 137 of the Code of Civil Procedure empowers a Civil Court, of its own accord, and in its discretion, upon the application of any of the parties to a suit, to send for, either from its own records or from any other Court, the record of any other suit or proceeding and inspect the same. Every application made under this section must, unless the Court otherwise directs, be supported by an affidavit of the applicant or his pleader, showing how the record is material to the suit in which the application is made, and that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice. Nothing contained in this section is to be deemed to enable the Court to use in evidence any document which, under The Indian Evidence Act, would be inadmissible in the suit. As to its being the duty of the parties themselves to take the necessary steps under this section, if they want papers produced from another record, see *Chandi Charan Shashmal* v. *Durga Charan Mirdua*, P. C. I. L. R. 9 Calc. 260 : 12 C. L. R. 81. The Code of Criminal Procedure contains no section similar to section 137 of the Code of Civil Procedure.

Power to send for Original Public Documents.

The procedure with regard to the discovery and inspection of documents in civil cases is laid down in sections 129 to 134 of the Civil Procedure Code and has been considered in the case of *Dhapi* v. *Ram Prasad*, I. L. R. 14 Calc. 768. Chapter X of the Code of Criminal Procedure contains provisions (sections 94 to 98) authorising the issue of processes for compelling the production of documents in criminal cases. The effect of these sections has been discussed in the case of *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (I. L. R. 15 Calc. 109). In this case it has been pointed out that in England no man can be compelled to produce evidence so as to criminate himself, and that discovery is only granted in equity in aid of civil rights and never in aid of a criminal prosecution ; but in this country, it has been said, the law is not the same, and here an accused person may be compelled to produce evidence against himself, provided, 1*st*, that the documents called for or in regard to which a search warrant is issued must be distinctly specified ; 2*nd*, that the documents are necessary for the purpose of the enquiry ; and, 3*rd*, that while granting a search warrant the Magistrate must exercise

his judicial discretion and must not make such an order unless the materials before him justify him in doing so. After the documents have been seized, they can be inspected by the prosecutor and can be put in by him as evidence against the accused.

It has been already mentioned that there is no Statute of Frauds in India out of the Presidency towns, *ante*, p. 418. Contracts which under this Statute must be in writing can, therefore, be made *orally* in the Indian Mufassil. There are, however, certain contracts which, if they have been made in writing, must be registered in order to have effect; and there are others, the registration of the writing containing which is *optional* but not compulsory. The following sections of The Indian Registration Act, III of 1877, show what documents *must* be registered; what documents *may* be registered; and what are the effects of registration and non-registration :—

Registration.

17.—The documents next hereinafter mentioned *shall* be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or Act No. XX of 1866, or Act No. VIII of 1871, or this Act came or comes into force (that is to say),—

Documents of which the registration is compulsory

(*a*) instruments of gift of immoveable property:

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish,[9] whether in present or in future, any right, title or interest, whether vested or contingent, of the *value of one hundred rupees and upwards* to or in immoveable property:

(*c*) non-testamentary instruments which *acknowledge the receipt or payment of any consideration* on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest. and

(*d*) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent

Provided that the Local Government may, by order published in the Official Gazette, exempt from the operation of the former part of the section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

Exception

Nothing in clauses (*b*) and (*c*) of the section applies to—

of composition-deeds;

(*e*) to any composition-deed:

(*f*) to any instrument relating to shares in a Joint Stock-Company, notwithstanding that the assets of such Company consist in whole or in part of immoveable property: or

and of transfers of shares and debentures in Land Companies.

(*ff*) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in

[9] See *Kalpagathachi* v. *Ganapathi Pillai*, I. L. R. 3 Mad. 184 (Release of widow's right of maintenance).

immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures[1]: or

(*g*) to any endorsement upon or transfer of any debenture issued by any such Company:

Documents merely creating right to obtain other documents.

(*h*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain[2] another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest:

(*i*) decrees and orders of Courts, and awards:

(*j*) grants of immoveable property by Government:

(*k*) instruments of partition made by revenue officers:

(*l*) certificates and instruments of collateral security granted under The Land Improvement Act, 1871:

(*m*) orders granting loans under The Agriculturists' Loans Act, 1884, and instruments for securing repayment of loans made under that Act[3]:

(*n*) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage[3]:

(*o*) a certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.[4]

Authorities to *adopt a son* executed after the first day of January, 1872, and not conferred by a will, shall also be registered.[5]

Documents of which the registration is optional.

18. Any of the documents next hereinafter mentioned may be registered under this Act (that is to say)—

(*a*) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value *less than one hundred rupees*, to or in immoveable property:

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[1] This clause was added by section 2, Act VII of 1886.

[2] See for instances, *Burjorji Curseiji Panthaki* v. *Muncherji Kuverji*, I. L. R. 5 Bom. 143; *Chunilal Panalal* v. *Bomanji Muncherji Modi*, I. L. R. 7 Bom. 310; *Kedarnath Mitter* v. *Surendro Deb Rai*, I. L. R. 9 Calc. 866; *Pratab Chandra Ghosh* v. *Mohendro Nath Purkhait*, I. L. R. 17 Calc. 291; L. R. 16 I. A. 233. The cases of *Ramasami* v. *Ramasami*, I. L. R. 5 Mad. 115; and *Lakshamma* v. *Kamesiwara*, I. L. R. 13 Mad. 281, were held not to be within the clause.

[3] Clauses (*m*) and (*n*) were added by sections 2 and 3, Act VII of 1886.

[4] Clause (*o*) was added by section 65, Act VII of 1888.

[5] See *Bhasba Rabidut Singh* v. *Indra Kunwar*, I. L. R. 16 Calc. 556. For certain agreements which, in order to be binding contracts, must be registered, see section 25, clause (1) of The Indian Contract Act, IX of 1872.

(*b*) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(*c*) Leases of immoveable property for any term not exceeding one year, and leases exempted under section 17;

(*d*) Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in moveable property;

(*e*) Wills;

(*f*) All other documents not required by section 17 to be registered.

Time from which registered document operates.

47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Registered documents relating to property when to take effect against oral agreements.

48. All non-testamentary documents duly registered under this Act and relating to any property, whether moveable or immoveable, shall take effect against any *oral* agreement or declaration relating to such property, *unless where the agreement or declaration has been accompanied or followed by delivery of possession.*[6]

Effect of non-registration of documents required to be registered.

49. No document required by section seventeen to be registered, shall affect any immoveable property comprised therein,

or confer any power to adopt,

or be received as evidence of any transaction *affecting such property or conferring such power,*[7]

unless it has been registered in accordance with the provisions of this Act.

Registered documents relating to immoveables, of which the registration is optional, to take effect against unregistered documents.

50. Every document of the kinds mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section seventeen, and clauses (*a*) and (*b*) of section eighteen, shall, if duly registered, take effect as regards the property comprised therein, *against every unregistered document* relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Nothing in the former part of this section applies to leases exempted under the proviso in section seventeen, or to the documents mentioned in clauses (*e*), (*f*), (*ff*), (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*) and (*o*) of the same section.

Explanation.—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under Act No. VIII of 1871 on this Act.

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[6] Testamentary documents, *i.e.*, wills, are excluded from the operation of section 48. The registration of written wills is optional. Nuncupative or verbal wills are legal, except in cases to which Act X of 1865 or Act XXI of 1870 applies and requires writing.

[7] It may, however, be used in evidence in support of a claim for moveable property—*Thandavan* v. *Valliamma*, I. L. R., 15 Mad. 336.

By section 3, Act III of 1885, sections 54 (paras. 2 and 3), 59, 107 and 123 of The Transfer of Property Act, IV of 1882, are to be read as supplemental to The Indian Registration Act. They are as follow.—

Section 54 (paras. 2 and 3).—Such transfer (*i.e.*, transfer by sale) in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Section 59.—Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agents of documents of title to immoveable property, with intent to create a security thereon.

Section 107.—A lease of the immoveable property from year to year, or for any other term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

Section 123.—For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Act III of 1877 is the fourth Registration Act passed within the space of thirteen years (the other three being Acts XVI of 1864, XX of 1866, and VIII of 1871). Act III of 1877 has now itself been amended by Acts XII of 1889, VII of 1886, and VII of 1888, section 65.

Effect of Registration and Transfer of Property Acts.

The impossibility of at once dealing successfully with a new subject of legislation necessitated this repeated revision of the law, which has been directed to remove difficulties as they arose and to reform what was found in practice not to work satisfactorily. Very considerable modifications in the class of deeds, the registration of which is compulsory, have been made by the sections of The Transfer of Property above cited. The effect of the combined Acts is that the registration of deeds of sale or of mortgage of immoveable property of the value Rs. 100 and upwards, of leases year by year, or for a term exceeding

a year, and of deeds of gift of immoveable property of any value, is compulsory. Deeds of sale, or mortgage of immoveable property of less than Rs. 100 in value, and deeds of gift of moveable property, must also be registered, unless there is delivery of possession, when the transfer is effected without a deed. In the case of a simple mortgage, there can be no delivery of possession; so all such deeds must be registered The effect of section 54 of The Transfer of Property Act on optional registration was first pointed out by *Garth, C. J.*, in *Naram Chandra Chakravartti* v. *Dataram Rai*, I. L. R. 8 Calc. 612 : 10 C. L. R. 241, in which he observed that it "virtually abolished optional registration. No transfer can now be made," it was said, "by any instrument in writing unless it is registered. It is true that in cases of possessory interest, the value of which is less than Rs. 100, an oral transfer coupled with possession will pass the property; but there will be no such thing as a transfer in writing unless it is registered. A registered transfer without delivery of possession will pass any interest in land, whether in possession or otherwise; and when the value of the interest amounts to Rs. 100 there is no other means of transferring it." These observations of *Garth, C. J.*, as to the effect of section 54 of The Transfer of Property Act on deeds of transfer of property of less than Rs. 100 in value were dissented from in *Khatu Bibi* v. *Madhuram Barsik*, I. L. R. 16 Calc. 622, but the decision in this case was overruled by a Full Bench in *Makhan Lal Pal* v. *Banka Bihari Ghosh*, I. L. R. 19 Calc. 623, in which, after reference to section 3, Act III of 1885, it was settled that the transfer by sale of tangible immoveable property of less than Rs. 100 in value can only be effected by one of the two modes mentioned in section 54 of Act IV of 1882, *viz.*, by a registered instrument or by delivery of possession. It may be here pointed out that by section 118 of The Transfer of Property Act, transfers of property by exchange can be made only in the manner provided for the transfer of such property by sale.

The following documents have been held to require registration under the compulsory provisions of the Registration Acts, and to be inadmissible in evidence when not registered :—A *daul darkhast* or application for a lease, upon which the word "granted" was written, if effect is sought to be given thereto as a lease or an agreement for a lease (*Safdar Reza* v. *Amzad Ali*, I. L. R. F. B. 7 Calc. 703 : 10 C. L. R. 121 : *Lal Jha* v. *Negru*, I. L. R. 7 Calc. 717) :—an agreement for a lease if intended to create a present demise (*Purmanand Das Jivan Das* v. *Dharsey Virji*, I. L. R. 10 Bom. 101) :—a favourable lease in the Madras Presidency for a term of forty years, which was held not to be a *pattah* within section 3 of Act VIII (M. C.) of 1865 (*Ramasami Chetti* v. *The Collector of Madura*, L. R. 6 I. A. 170 : I. L. R. 2 Mad. 67) : -a document termed a receipt, but used for the purpose of showing that a mortgage lien had been released (*Basáwa* v. *Kalkápá*, I. L. R. 2 Bom. 489 : but see *Gayanfar Ali* v. *Mohamed Yasin*, 20 W. R. 334) :—a receipt for Rs. 250 tendered in evidence to show that the interest of a co-mortgagee had been extinguished (*Ramápa* v. *Umanná*, I. L. R. 7 Bom.

Documents held to require registration.

123, distinguished from *Shivlingapa* v. *Chenbasapa*, I. L. R. 4 Bom. 236, where the receipt was used merely to show the state of account between mortgagor and mortgagee; the latter case was followed in *Annapa* v. *Ganpati*, I. L. R. 5 Bom. 181):—a *pattah* for one *fasli*, containing a provision that it was to remain in force until another *pattah* was granted (*Venkatachellam Chetti* v. *Audian*, I. L. R. 3 Mad. 358, distinguished from *Apa Budgavda* v. *Narhari Annaji*, I. L. R. 3 Bom. 21, in which there was merely an expression of readiness on the part of the tenant to hold over, if the landlord desired it); see *contra*, *Virammal* v. *Kasturi Rungayyangar*, I. L. R. 4 Mad. 381: *Khayali* v. *Hussain Baksh*, I. L. R. 8 All. 198: a *zar-i peshgi* lease granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in force: *Bhobani Mahto* v. *Shib Nath Para*, I. L. R. 13 Calc. 113:—an endorsement on a returned conveyance to which it was sought to give the effect of a retransfer (*Umedmal Motiram* v. *Damu Rin Dhondiba*, I. L. R. 2 Bom. 547):—a deed of satisfaction given by a first mortgagee to his mortgagor and a second mortgage (*Mahadaji* v. *Vyankaji Govind*, I. L. R. 1 Bom. 197):—an assignment of a mortgage for Rs. 5, but which was stamped with a stamp of Rs. 168, and part of the consideration for which was the withdrawal of a suit (*Nago Kanaturia* v. *Babaji Katari*, I. L. R. 8 Bom. 610):—an agreement "for the use and hire of a steam engine, boiler, and machinery sheds and a bungalow" being held to be for *immoveable* property (*Winterscale* v. *Gopal Chandra Sil*, 3 B. L. R. O. C. 90):—an agreement to convey, if effect be sought to be given to it as a conveyance (*Shama Charan Neogi* v. *Nobin Chandra Dhoba*, 6 B. L. R. App. 1):—a lease without any term but reserving an annual rent (*Ram Kumar Mandal* v. *Brajahari Mirdha*, 2 B. L. R. A. C. 75, decided on the old Act—see now the language of clause (*d*) of section 17):—a lease of a house containing a covenant by the lessee to purchase on the occurrence of a certain event, which did take place: (*Sambayya* v. *Gangayya*, I. L. R. 13 Mad. 308):—a statement of a testamentary character as to succession by an Oudh talukdar—section 20, Act I of 1869 (*Har Prasad* v. *Sheo Dyal*, L. R. 3 I. A. 259: *Haidar Ali* v. *Tasadak Rasul Khan*, L. R. 17 I. A. 82).

The following documents have been held not to require registration under the compulsory provisions of the Registration Acts, and to be admissible in evidence, even though not registered: a decree, (*Purmanand Das Jivandas* v. *Vallabdas Wallji*, I. L. R. 11 Bom. 506):—an assignment of a decree for sale of hypothecated property (*Abdul Majid* v. *Mahamud Faizullah*, I. L. R. 13 All. 89):—a deed of partition of immoveable property, unless it is a deed of partition made by a revenue officer (*Nim Rai* v. *Lalman Rai*, 23 W. R. 376):—a written acknowledgment of partition of such property, in any other form than that of receipt (*Sakharam Krishnaji* v. *Madan Krishnaji*, I. L. R. 5 Bom. 232):—an agreement for the purchase and sale of immoveable property, making the completion of the contract subject to the approval of the purchaser's solicitors and providing that, if they should

Documents held not to require registration.

not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title (*Srigopal Mollik* v. *Ram Charan Laskar*, I. L. R. 8 Calc. 856) :—a document securing the sum of Rs. 95 upon a piece of land and giving the lender possession for four years at a yearly rent of Rs. 8-12 annas, out of which Rs. 2 were to be paid to Government as revenue and the balance, Rs. 6-12 annas, was to be retained by the lender as interest upon the loan of Rs. 96 (*Ram Dulari Koer* v. *Thakur Rai*, I. L. R. 4 Calc. 61) :—a letter depositing title deeds and creating on equitable mortgage (*Durganath Mitra* v. *Sarát Kumári Dasi*, 7 B. L. R. 55: *Kedarnath Datta* v. *Sham Lal Khettri* 20 W. R. 150: 11 B. L. R. 414; but see *The Bengal Banking Corporation* v. *Mackertich*, I. L. R. 10 Calc. 315, where it was held that a document which creates an equitable mortgage must be registered under the present Act; *aliter*, if it amounts merely to an agreement to mortgage) :—an agreement to deposit title-deeds (*Currie* v. *Chatty*, 11 W. R. 520) :—an assignment of a registered bond hypothecating moveable property, *viz.*, crops (*Kalla Prasad* v. *Chandan Singh*, I. L. R. 10 All. 20) :—a lease for a year, but containing a covenant for renewal (*Radhika Persad Chandra* v. *Ram Sundar Kar*, 1 B. L. R. A. C. 7 *Boyd* v. *Krieg*, I. L. R. 17 Calc. 548). a lease for a year and creating thereafter a tenancy at will (*Jagjiran Jacher Das* v. *Narayan*, I. L. R. Bom. 493) :—a lease creating a tenancy at will (*Khuda Baksh* v. *Sheodin*, I. L. R. 8 All. 405: *Jivraj Gopal* v. *Atmaram Dayaram*, I. L. R. 14 Bom. 319) :—a document executed before the new Registration Act, which might have been but was not registered under it (*Ram Saran Das* v. *Ram Chand*, 1 N. W. P. Rep. 283. *Chotardhari Misar* v. *Narsingh Dutt Sukal*, 4 N.-W. P. Rep. 371: in the latter case it was further held that there is no preference over such a document) :—endorsements of payments on mortgage bonds which do not purpose to limit or extinguish an interest in immoveable property, but are merely memoranda made by the mortgagee (*Jiwan Ali* v. *Basa Mal*, I. L. R. 9 All. 108) :—a composition deed (*Subbaraya* v. *Vythilinga*, I. L. R. 16 Mad. 85) :—a letter operating as grant or authority from Government (*Hassan Ali* v. *Chattarpat Singh Dugarh*, I. L. R. 19 Calc. 742).

Under section 49 an unregistered document which requires registration is inadmissible as evidence of any transaction affecting immoveable property or conferring a power to adopt. Oral evidence of the transaction will be excluded by section 91 of The Evidence Act. The *result* is that transactions committed to writing if not registered when registration is necessary, are *incapable of proof and wholly inoperative*. This was held to be the result of The Registration Act even before The Evidence Act came into operation. In the case of *Rahmatula* v. *Sarlatula Kagchi* (1 B. L. R. F. B. 58), the plaintiff sued to establish his title to certain land which he alleged that he had purchased. There was a written conveyance, which was not registered, owing, as the plaintiff averred, to certain fraudulent objections made before the registering officer by the defendant, the alleged vendor. It was decided that the plaintiff

Transaction committed to writing, if not registered where registration is compulsory, incapable of proof

transaction affecting immoveable property or conferring a power to adopt, will yet be admissible for other purposes. The principle here involved was established by several decisions under the earlier Acts, and the addition of the above words acknowledged the policy and correctness of these decisions. In *Sham Narain Lal* v. *Khimajit Matoe* (4 B. L. R. F. B. 2), the defendant had borrowed a sum of money from the plaintiff on a mortgage, a lease to the plaintiff's son forming part of the transaction. This lease contained a covenant for registration which the defendant refused to perform. The plaintiff, being therefore unable to acquire a title in the mortgaged property, brought his action for recovery of the money advanced, together with interest. It was objected that the mortgage lease was inadmissible as evidence because not registered: but a Full Bench of the Calcutta High Court held it admissible to prove the agreement to register. It was observed that the defendant could not be allowed to avail himself of the non-registration of the document for the purpose of protecting himself in a suit against him for a breach of his covenant to register; that, if such were the law, the plaintiff would be without a remedy, and the grossest injustice might be perpetrated. In *Lachmipat Singh Dugar* v. *Khairat Ali* (4 B. L. R. F. B. 18), the instrument was a bond securing the repayment of money lent, and also assigning certain immoveable property by way of security for this repayment. The plaintiff sued on the bond for the recovery of the money only; and a Full Bench held that the document was admissible simply for the purpose of enforcing against the obligor personally the payment of the money secured by it, although without registration it would not be admissible as evidence to prove that the obligee was entitled to the security of the land.[2] In *Sheo Dial* v. *Prag Dat Misr* (F. B. I. L. R. 3 All. 229), the document was a bond for the payment of money, which also hypothecated certain immoveable property as collateral security for such payment; and it was held that, though inadmissible for want of registration to enforce the lien on the immoveable property, it could be received in evidence to prove the money obligation. See to the same effect *Lachman Singh* v. *Kesri*, I. L. R. 4 All. 3. From these cases was distinguished *Martin* v. *Sheo Ram Lal* (I. L. R. 4 All. 232), in which the unregistered document was a lease, which contained a stipulation that, if the lessor failed to put the lessee in possession, he would pay damages at the rate Rs. 40 per

[2] See also the following cases:—*Khushalo* v. *Behari Lal*, I. L. R. 3 All. 523 (Unregistered conveyance containing an acknowledgment of a debt); *Sipahi Singh* v. *Chandan*, 2 N.-W. P. Rep. 166; *Court of Wards* v. *Nila Kali Debi*, 3 B. L. R. A. C. 353; *Manomathonath De* v. *Srinath Ghosh*, 20 W. R. 107; *Stri Seshathiri Ayyengar* v. *Sankara Ayyen*, 7 Mad. H. C. Rep. 296; *Kattamuri Jagappa* v. *Padalu Latchappa*, I. L. R. 5 Mad. 119; *Guduri Jaggannadham* v. *Rapaka Ramana*, 7 Mad. H. C. Rep. 348; *Vallaya Padagachy* v. *Moorthy Padyachy*, 4 Mad. H. C. Rep. 174; *Tukaram Vithoji* v. *Khandoji Malharji*, 6 Bom. H. C. Rep. O. C. 134; *Sangappa Bin Ningappa* v. *Basappa Bin Parappa*, 7 Bom. H. C. Rep. A. C. 1; *Nilmadhab Singh Das* v. *Fatteh Chand Sahu*, 3 B. L. R. A. C. 310; *Sib Persad Das* v. *Annapurna Dayi*, 3 B. L. R. A. C. 451; *Udai Chand Jana* v. *Nitai Mandal*, 9 W. R. 111; *Gopal Persad* v. *Nandarani*, 1 B. L. R. A. C. 192; *Batto Kristo Das* v. *Khetra Chandra Bhattacharjya*, 6 B. L. R. App. 69; *Eshri Rai* v. *Bindut Rai*, 4 N.-W. P. Rep. 60; *Sita Kalwar* v. *Jagarnath Persad*, *id.* 70

bigha for the land of which possession was not given, the whole of the land being hypothecated for the payment of such damages. In a suit for damages in the event provided for, the lessee asked for a money-decree merely, and did not seek to enforce the hypothecation. It was held that the unregistered lease could not be admitted in evidence, as it was impossible to separate the leasing of the land from the lessor's personal liability for damages, or to hold that the contract was other than one and indivisible. See to the same effect *Matangini Dasi* v. *Ramnarain Sadkhan* (I. L. R. 4 Calc. 83), where also the transaction was held to be single and indivisible, and *Raju Balkrishna* v. *Krishnarav Ramchandra* (I. L. R. 2 Bom. 273). In *Krishto Lal Ghosh* v. *Bonomali Rai* (I. L. R. 5 Calc. 612 : 5 C. L. R. 43), the same principle was recognized, but the transaction was held to be divisible when upon a loan of money it was agreed (1) that the loan should be secured by a bond containing a covenant for repayment of the sum lent with interest within a certain time, and (2) that certain immoveable property should be hypothecated as collateral security for the repayment of the loan. See also *Gaur Charan Sarma* v. *Jinnat Ali*, 11 C. L. R. 166. In *Ulfatunissa* v. *Hosein Khan* (I. L. R. 9 Calc. 520 : 12 C. L. R. 209), there was an unregistered bond containing a personal undertaking to repay money borrowed, and also an hypothecation of land above Rs. 100 in value as collateral security. The suit was to enforce the personal obligation. It was contended that the unregistered instrument was inadmissible to prove this obligation, as there was only one transaction. In referring the point to a Full Bench, *Wilson J.*, said :—"The whole question appears to turn upon the meaning of the word *transaction*. Where under one contract and for one consideration two obligations are undertaken, one affecting land and the other not, is the whole one transaction within the meaning of section 49? Or may it be said that there are two distinct transactions, provided the obligation which does not affect land be both intelligible and capable of performance without reference to the other which does?" The Full Bench, without answering this question categorically, were of opinion that the unregistered document was admissible for the purpose for which it was sought to be used : that the words in section 49 "shall be received as evidence of any transaction affecting land" must be interpreted to mean "shall be received as evidence of any transaction so far as it affects land." See also *The Bengal Banking Corporation* v. *Mackertich*, I. L. R. 10 Calc. 322

Effect of admission of execution of unregistered deed

When the fact is admitted, to prove which it would be necessary to use in evidence a document which has not been registered, although registration thereof is by law compulsory, the non-registration cannot affect the decision of the case. The question of registration becomes material only when it is sought to use the document in evidence (*Reza Ali* v. *Bhilan Khan*, 7 W. R. 334 : *Chedambaram Chetty* v. *Karunalya Valangapuly Tavet*, 3 Mad. H. C. Rep. 342). It must, however, be very doubtful whether, if the document itself were tendered in evidence, any admission of its execution could make up for the want of registration. There is a difference

between admitting the fact, to prove which the document is sought to be used, and admitting the document itself when offered as evidence and rejected for want of registration. Where, in consequence of the admission, it becomes unnecessary to use the document at all, the fact of non-registration may be immaterial; but the case is very different when the existence of the document is disclosed. In *Somu Gurukkal* v. *Rangammal* (7 Mad. H. C. Rep. 13), it was held that no effect could be given to a sale evidenced by admissions when there was an unregistered deed of sale which should have been registered under Act XX of 1866, the word "instrument" in section 49 being used on the understanding that the writing is not merely evidence of the transaction, but is the transaction itself.

Preference of Registered Documents to (1) Oral Agreements, (2) Unregistered Documents.

Sections 48 and 50 may be considered together. They provide respectively (1) for the case of a *registered* document coming into conflict with an *oral* agreement or declaration relating to moveable or immoveable property; and (2) for the case of a *registered* document coming into conflict with an *unregistered* document relating to immoveable property. In section 48, which provides for the first case, the words "*unless where the agreement or declaration has been accompanied or followed by delivery of possession*" were first inserted in Act VIII of 1871, in accordance with two decisions of the Calcutta High Court—*Selam Sheik* v. *Baidonath Ghatak*, 3 B. L. R. 312, and *Narsingh Purkhait* v. *Mussamat Bewah*, 5 B. L. R. App. 86. In the former of these cases the reason of the decision will be found fully discussed.[a] The second case expressly follows the first, but the agreement which was here accompanied by possession was a *written unregistered* lease, which the Court however dealt with in the view of a parol contract. Having reference to section 49 of the present Act, it is clear that such an instrument cannot be used at all as evidence of any transaction affecting immoveable property; and, there being a writing in existence, section 91 of The Evidence Act will exclude oral evidence of the contract.[b] Where a person purchases with actual notice of a prior oral agreement to sell to another person, he will not be allowed to retain the property, and a suit for

[a] For an instance of an oral agreement not accompanied or followed by possession being held not to avail against a subsequent registered instrument, see *Nathu Ram* v. *Phul Chand*, I. L. R. 6 All. 581.

[b] For cases of unregistered documents followed by possession, see *Balaram Nemchand* v. *Appa Valad Dulu*, 9 Bom. H. C. Rep. 121: *Manmal Valad Suratmal* v. *Dastreet Valad Narayan*, 9 Bom. H. C. Rep. 147: *Sudharam Bhattacharjya* v. *Akhai Chandra Banarji*, 19 W. R. 279: *Girija Singh* v. *Giridhari Singh*, 1 B. L. R. A. C. 14, with which compare *Sudharam Bhattacharjya* v. *Udhai Chandra Bandapadhya*, 10 B. L. R. 380: *Batulan* v. *Waziran*, 8 W. R. 300 (under Act XIX of 1843). In the case of *Issari Dasi* v. *Lal Bihari Haldar* (21 W. R. 421), the Calcutta High Court refused to extend the principle that a later registered document shall not prevail over an earlier unregistered document followed by possession, to a case in which the person relying on the unregistered document had been dispossessed by the person claiming under the registered document; and instead of instituting a possessory suit under section 15 of Act XIV of 1859 (see now section 9 of The Specific Relief Act, I of 1877) had sued to recover possession upon proof of title. The application of the principle was also considered in *Kirti Chandra Haldar* v. *Raj Chandra Haldar*, 22 W. R. 273.

specific performance may be successfully maintained by such other person against him and the vendor (*Waman Ramchandra* v. *Dhondiba Krishnaji*, I. L. R. 4 Bom. 126: *Nemai Charan Dhabal* v. *Kokil Bag*, I. L. R. 6 Calc. 531: *Ram Autar* v. *Dhanauri*, I. L. R. 8 All. 340: *Kadar* v. *Ismail*, I. L. R. 9 Mad. 119.)* The second case is provided for by section 50, which specifies, *first*, documents of the kinds mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17; and, *second*, documents of the kind mentioned in clauses (*a*) and (*b*) of section 18. Clauses (*a*) and (*d*) of section 17 are concerned respectively with instruments of gift of immoveable property (whatever be its value) and leases. Clauses (*b*) and (*c*) of section 17 are concerned with the same kinds of documents as clauses (*a*) and (*b*) of section 18 with this difference, that the right, title or interest in the immoveable property under the former section is of the value of one hundred rupees and upwards—under the latter section it is less than one hundred rupees. Where the registration of a document is compulsory, the document, if not registered, is inadmissible; secondary evidence cannot be received, and no effect can be given to the written transaction. As every one is presumed to know the law, the person who suffers loss in consequence of not complying with its provisions cannot be heard to complain. Before the passing of The Transfer of Property Act if the document was concerned with property of a value *less than one hundred rupees*, the law did not require registration: the unregistered document was admissible to prove the transaction, and the purchaser neglected nothing which the law directed. It might seem that such a purchaser, especially if he had got possession, was in a position of sufficient security: and in *Dino Nath Ghosh* v. *Anluck Mani Debi* (I. L. R. 7 Calc. 753: 10 C. L. R. 129), it was held that a person claiming under a later registered conveyance without possession could not prevail against him. It was said that the vendor having conveyed to the first purchaser and having put him in possession had nothing left to convey to any one desiring to purchase afterwards. The question was, however, reconsidered and this decision overruled in the Full Bench case of *Narain Chandra Chakravartti* v. *Dataram Rai* (I. L. R. 8 Calc. 597: 10 C. L. R. 241). Here A sold a plot of land to B and put him in possession. The purchase-money was less than Rs. 100 and the conveyance was not registered. Subsequently, A sold the same plot of land to C by a registered conveyance. The first vendee was ejected, and in a suit by him to recover possession, it was decided that the fact of the vendor having given him possession, even if such possession continued to the date of the second conveyance, would not prevent the registered document from taking effect as regarded the property therein comprised against the unregistered document relating to the same property. It was observed that the only case in which the title of a prior

Case of unregistered document with possession.

* Constructive possession is sufficient to satisfy the requirements of section 48 of The Registration Act: *Palani* v. *Selambara*, I. L. R. 9 Mad. 267. So is possession of land as an incumbrancer: *Kannan* v. *Krishnan*, I. L. R. 13 Mad. 324.

unregistered purchaser can prevail against a subsequent registered purchaser for value is when the latter *takes with notice of the former*. See also *Fuzludin Khan* v. *Fakir Mahomed Khan* (I. L. R. 5 Calc. 336), in which *Pontifex, J.*, held that the registered conveyance could not take effect against a prior unregistered conveyance, if the purchaser under the registered conveyance had actual notice of the previous sale. In *Nani Bibi* v. *Hafizullah*, I. L. R. 10 Calc. 1073, it was said that, although the mere fact of possession having been taken under an unregistered conveyance is insufficient of itself to establish a good title to a property as against a subsequent registered purchaser, and is not conclusive evidence of notice as against him, yet, in the majority of cases, such possession is very cogent evidence of notice. But in *Sunamani Nath* v. *Basant Kumari Dasi*, I. L. R. 16 Calc. 414, it was held that notice of possession of rents of property is notice of the tenancy, but does not of itself affect a purchaser with notice of the lessor's title.[6] Later cases as to the preference to be given to registered as against unregistered conveyances, even if accompanied with possession, are those of *Bhalu Rai* v. *Jakhu Rai*, I. L. R. 11 Calc. 667: and *Abul Hussein* v. *Raghu Nath Sahu*, I. L. R. 13 Calc. 70.[7] The Madras High Court, while accepting the view of the Calcutta High

Effect of registered purchaser having notice of unregistered documents.

[6] See also *Bama Sundari Dasi* v. *Krishna Chandra Dhar*, I. L. R. 10 Calc. 424.

[7] Reference may also be made to *Madras Building Co.* v. *Rowlandson*, I. L. R. 13 Mad. 383: and *Sham Moun Mull* v. *Madras Building Co.*, I. L. R. 15 Mad. 268: and to the following cases upon the subject of registered documents taking effect against unregistered documents:—*Muthanna* v. *Alibeg*, I. L. R. 6 Mad. 174: *Kondayya* v. *Gurunappa*, I. L. R. 5 Mad. 139 (Eight years' possession under unregistered optionally registrable document defeated by subsequent registered sale): *Habibula* v. *Nakched Rai*, I. L. R. 5 All. 447: *Sobhag Chand Golab Chand* v. *Bhaichand*, I. L. R. 6 Bom. 193 (*San* mortgage in Guzrat; section 50 applies only where the two documents are antagonistic, not where effect can be given to each without infringement of the other; registered sale-certificates *versus* unregistered *san* mortgage): *Mansur Ali* v. *Azmat Ali*, 9 W. R. 282: *Gayaram Mazumdar* v. *Madhu Sudhan Mazumdar*, 4 B. L. R. App. 73 *Rama Chandra* v. *Krishna*, I. L. R. 9 Mad. 495 *Imrit Singh* v. *Kailash Kunwar*, 11 W. R. 559 (Deed of sale registered under Act XX of 1866 not preferred to unregistered deed executed before this Act came into operation, when registration was not necessary) *Makandas Kadidas* v. *Shankardas Haribhai*, 12 Bom. H. C. Rep. 241: *Lakhmichand Walchand* v. *Kastur Bechar*, 9 Bom. H. C. Rep. 60 (Registered sale certificate held not to take effect against a prior unregistered deed of sale). *Khandu Dabladas* v. *Tarachand Amarchand*, I. L. R. 1 Bom. 574 (Mortgage deed registered under Act XX of 1866 not allowed to prevail against previous mortgage-deed which might have been, but was not, registered under Act XIX of 1843). As to the priority of registered instruments under the old law, the following cases may be yet useful:—*Mahesur Baksh Singh* v. *Bhika Chaudhri*, 1 Jur. N. S. 122; 5 W. R. 61 (Registered deed of sale held not to invalidate prior mortgage-deed though unregistered): *Farzand Ali* v. *Abdur Rahim*, 4 W. R. 30—see also *Krishnasami Pillai* v. *Venkata Chella Aiyan*, 3 Mad. H. C. Rep. 89 (Preference given to registered instrument notwithstanding notice of previous unregistered conveyance): *Nazar Ali* v. *Imdad Ali*, 1 W.R. 206 (Registered prevailed over unregistered instrument, both being *bonâ fide*): *Kailas Chandra Chatarji* v. *Gopal Chandra Chatarji*, 1 W. R. 78 (Preference of registered instrument to previous verbal contract): *Hirachand Babaji* v. *Bhaskar Ababhat Shende*, 2 Bom. H. C. Rep. 207.

Court as to a registered conveyance taking effect against an unregistered conveyance accompanied or followed by possession, expressly dissented from the opinion that notice alters the case, and decided that the registered purchaser must prevail even if he have purchased with full notice of a prior unregistered sale or incumbrance (*Nallapa Goundan* v. *Ibram Sahib*, I. L. R. 5 Mad. 73. *Madar Sahib* v. *Subbarayalu Naipudu*, I. L. R. 6 Mad 88)[a] In the latter case not only had the latter registered purchaser full notice of a prior unregistered mortgage, but the mortgagee had obtained a decree declaring the property liable to be sold in default of payment of the amount of such decree. They have, however in the recent Full Bench case of *Krishnamma* v. *Suranna*, I. L. R. 16 Mad. 148, recanted and laid down that, when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance, and of possession by such encumbrancer, or of such conveyance without possession the Courts are not bound to interpret The Registration Act of 1877, s. 50, so as to defeat the title of the prior encumbrancer. The Bombay Court have followed the Calcutta Court in holding a case of notice to be an exception to the general rule of section 50 (*Shivram* v. *Genu*, I. L. R. 5 Bom. 515: *Fatha Singh Sobhai* v. *Kuvarji Javher*, I. L. R. 10 Bom. 105). The Allahabad High Court has also ruled to the same effect (*Ram Autar* v. *Dhanauri*, I. L. R 8 All 540), so that the High Courts of all the Presidencies are now in accord as to the interpretation of this section of The Registration Act. In this context may be noticed the case of *Hicks* v. *Powell* (L. R. 4 Chan. Ap Cas. 741). Here A, resident at Madras, executed, in 1865, a deed by which he conveyed land in India to B, covenanting for further assurance. The deed was not registered. In 1866 A mortgaged the same land to C, who had notice of B's conveyance C registered his mortgage under the Act of 1866. B filed a bill in Chancery in England to enforce the covenant for further assurance against C. Lord Hatherley held, affirming the decision of *Giffard* L. C., that B had no equity against C and the bill was dismissed

Under the Acts of 1864, 1866 and 1871 the rule as to registered instruments taking effect against unregistered instruments had no application to instruments the registration of which was compulsory. The result was that, where property was mortgaged for Rs. 95 and afterwards sold for Rs. 400, it was held that the deed of sale, the registration of which was compulsory, could not take effect against the mortgage deed, the registration of which was optional, the rule having application only where the registration of both

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[a] The Bombay Court further considers possession to be notice—See *Shivram* v. *Genu*, I. L. R 6 Bom 518 *Daniels* v. *Davison*, 17 Vesey 433 here quoted and *Lakshmandas Sarupchand* v *Dagrat*, I. L. R. 6 Bom 168. The Bombay Court has also adopted the American view that registration is notice to all subsequent purchasers—See the last case quoted, and also *Radhabai* v. *Shamrao Vinayak*, I. L. R. 8 Bom 172 *Hasha* v. *Raghu Ambo Gondhali*, I. L. R 6 Bom. 165 *Dundaya* v. *Chenbasapa* I. L. R. 9 Bom. 427. Constructive possession is not sufficient notice. *Moreshwar Balkrishna* v. *Dattu*, I. L. R. 12 Bom. 569. See *ante*, note to p. 455.

documents was optional (*Hamed Baksh* v. *Bindea Bun*, 2 N. W. P. Rep. 37; *Riyazatula* v. *Durga Charan Pal*, 15 B. L. R. 294 · 24 W. R. 121). The section (50) of the present Act has altered the law as laid down in these cases; and a registered document, *whether its registration be optional or compulsory, will now take effect against any unregistered* document, and "unregistered" is defined by the *explanation* to mean not registered, as well under the Act of 1877 as under the Acts of 1864, 1866 or 1871. Section 50 has not, however, a retrospective effect so as to give to any registered document, the registration of which was compulsory under any of the Acts of 1864, 1866 and 1871, the same effect which is given to a registered document, the registration of which is compulsory under the Act of 1877 (*Kanukar* v. *Joshi*, I. L. R. 5 Bom. 442 · *Ichharam Kalidas* v. *Govindram Bhowanishankar*, I. L. R. 5 Bom. 653: *Lakshmandas Sarupchand* v. *Dasrat*, I. L. R. 6 Bom. 168: *Rupchand Daganga* v. *Dattatrav Vithalrav*, I. L. R. 6 Bom. 495: *Sivram* v. *Bhagirath Lal*, F. B. I. L. R. 4 All. 227 *Shivram*, v. *Saya*, I. L. R. 13 Bom. 229). The Madras High Court has, however, taken the contrary view in *Kota Muthanna Chetti* v. *Alibey Sahib*, I. L. R 6 Mad. 174. As regards the unregistered document, the registration of which was optional, it is immaterial which Act was in force at the time when it might have been registered. A document registered under the Act of 1877, whether its registration was compulsory or optional, will take effect against any document, which might have been, but was not, registered under any of the three previous Acts (*Lachman Das* v. *Dip Chand*, F. B. I. L. R. 2 All. 851: *Abdul Rahim* v. *Zibun Bibi*, I. L. R 5 All. 593 *Kondayya* v. *Gururappa*, I. L. R 5 Mad. 139: *Shib Chandra Chakravarti* v. *Jaha Baksh*, I. L. R. 7 Calc. 570: 9 C. L. R. 224: *Gangaram Ghosh Sirdar* v. *Kalipado Ghosh*, I. L. R. 11 Calc. 661 · but see *Dori Lal* v. *Umed Singh*, I. L. R. 6 All. 164). It will be observed that the rule of preference has no application when the unregistered document is a decree or order of Court,[9] provided the decree or order has been made

Section 50 has not retrospective effect as to document compulsorily registrable

[9] The words "and not being a decree or order" in section 50 were first introduced in Act VIII of 1871. As to the advantage of registering decrees or orders, however, see Art. 179 of the second schedule of the new Limitation Act, XV of 1877, which allows *six* instead of *three* years for execution, when a certified copy of the decree or order has been registered.

The following cases concerned with the subject of registration may also be useful:—*Habibullah* v. *Nakched Rai*, I. L. R. 5 All. 447 (Valuation for registration to be made upon the principal sum only secured by a mortgage) *Santaya Mangorsaya* v. *Narayan*, I. L. R. 8 Bom. 182 (First conveyance executed 8th April, 1879, and registered 26th August, 1879; second conveyance executed 14th June, 1879, and registered same day; both conveyances optionally registrable; first purchaser held entitled to the land as documents take effect from date of execution, and second purchaser had notice of his title): *Jai Ram Gosain Bhattacharjya* v. *Kali Narain Rai*, 20 W. R. 291 (Intention of the parties to be looked at in order to see whether instrument creates a charge on immoveable property): *Jalu Namdar* v. *Bicha Namdar*, 3 B. L. R. A. C. 394 (Registered lease to take juice of date trees, *i.e.*, for *moveable* property, has no priority over a previous unregistered lease): *Girish Chandra Rai Chaudhri* v. *Amina Khatun*, 3 B. L.R. App. 125 (Objection as to inadmissibility for want of registration should be taken in

prior to the execution of the registered document: *Jagrup Rai* v. *Radhey Singh*, I. L. R. 13 All. 288. See also *Baijnath* v. *Lachman Das*, I. L. R. 7 All. 888.

Since the passing of The Transfer of Property Act, the provisions of sections 48 and 50 of Act III of 1877 are of much less importance than formerly.

Present state of law.

Now, in the case of a sale or mortgage of immoveable property of the value of Rs. 100 or more, a simple mortgage of such property of any value, or of a lease of such property from year to year or for a term exceeding a year, or a gift of such property of any value, a registered deed is indispensable. Neither an unregistered deed nor possession will in such cases be of any effect. In the case of a sale, or mortgage of immoveable property of less than Rs. 100 in value, other than a simple mortgage, or of gift of moveable property, a legal transfer may be effected by delivery of possession. In such cases, therefore, a deed registered or unregistered is unnecessary, and there can be no conflict between a registered and an unregistered deed. A registered deed, if executed, at once effects a valid transfer, whether there be delivery of possession or not. So an unregistered deed, if accompanied by delivery of possession, cannot prevail against it, that is to say, if the delivery of the possession has taken place on a date subsequent to the execution of the registered deed. The provisions of sections 48 and 50 no doubt continue to be applicable in the case of sales or hypothecation of moveable property, and of leases of kinds other than those specified in section 107 of The Transfer of Property Act.

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lower Court in order to be available in special appeal. The point was of, however, very directly decided in this case, and *Umdul Fatima* v. *Ghanshu Singh* (19 W. R. 23) is a direct authority to the contrary, it being there substantially held that a Court is bound to notice the fact of non-registration, whether the parties raise any objection on this head or not): *Prahlad Misra* v. *Aath Narain Singh*, 1 B. L. R. A. C. 197: and *Sithal Persad* v. *Har Chand Sahu*, 1 N. W. P. Rep. 263 (Priority of purchaser at sale in satisfaction of registered mortgage): *Mujid Hosen* v. *Jeawan Khewat*, 4 N.-W. P. Rep. 235 (Registered counterpart of lease admissible, although lease itself unregistered): *Prabhuram Hazra* v. *Robinson*, 3 B. L. R. App. 43 (No stipulation to register necessary where registration is by law compulsory).

The provisions of the Registration Acts will not be permitted to be used to subserve fraud. See the following cases:—*Bukhai Mir* v. *Nasir*, 20 W. R. 110: *Muhammad Ashraf* v. *Karimuddin*, 24 W. R. 468 (*Bonâ fide* purchaser for valuable consideration from unregistered mortgagee preferred to registered vendee): *Shamsher Ali* v. *Latafat Karim*, 18 W. R. 504 (A registered *mukarrari* lease not allowed to prevail against an unregistered conveyance, which defendant's vendor had obtained from plaintiff's servants in order to prevent its registration): *Gauri Kant Rai* v. *Giridhar Rai*, 4 B. L. R. A. C. 8: *Kamizudin Haldar* v. *Rajjab Ali Saha*, 9 W. R. 528: *Hilaludin* v. *Abdul Kadar*, 9 W. R. 351: *Bhikdari Singh* v. *Kanhya Lal*, 14 W. R. 24: *Ram Chand Kumar* v. *Madhu Sudhan Mazumdar*, 7 W. R. 119: *Srinath Charan Das* v. *Dwarkanath Ghosh*, 14 W. R. 318: *Prasanna Kumar Sandyal* v. *Mathuranath Banarji*, 8 B. L. R. App. 26 (Suit to *set aside* a document, the registration of which was obtained by improper means):—and still valuable although decided under the old law (*Srinath Battacharjya* v. *Ram Kamal Gangapadhya*, 10 Moo. I. A. 220: *Sidhi Nazar Ali Khan* v. *Ajodhya Ram Khan*, 10 Moo. I. A. 540: *Nitra Gopal Chandra* v. *Dwarkanath Mallik*, 1 W. R. 314: *Narasanna* v. *Ganappa*, 3 Mad. H. C. Rep. 270). See also *Narasimulu* v. *Somanna*, I. L. R. 8 Mad. 167, decided under the present law.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII.

OF THE BURDEN OF PROOF.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any act, it is said that the burden of proof lies on that person.

Illustrations.

(*a*) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(*b*) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true

A must prove the existence of those facts.

On whom burden of proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(*a*) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

English text-writers lay it down as one of the rules which govern the production of evidence that *the burden of proof lies on the party who*

substantially asserts the affirmative of the issue. In applying this rule, the substance and effect of the issue and not merely its grammatical form must be considered. For example, in an action for *not* keeping a house in repair according to a covenant in the lease, or for *not* executing a contract in a workmanlike manner, the negative allegation contained in the case set up by the plaintiff must be proved, if denied by the defendant. In order to the right application of the rule, the two following *tests* are usually employed :—*First*, consider which party would succeed if no evidence were given on either side; *secondly*, examine what would be the effect of striking out of the record the allegation to be proved. The *onus probandi* or burden of proof will lie on the party who would fail upon either course being taken. The first of these tests has been adopted in the above section of The Evidence Act. The other may, however, be usefully borne in mind, as there are some cases in which its application will be of material assistance. The two tests do not lead to different results; but the latter one will in some cases more readily effect what is required.

Rule how stated by English text-writers.

The application of the rule may advantageously be illustrated by examples taken from cases actually decided in India.

Examples taken from decided cases

When a claim is founded on a distinct statement of account admittedly signed by the defendant himself, it is for him to rebut the *primâ facie* case thus made out against him : *Elias* v. *Joravar Mall*, 24 W. R. 202. When one party alleges a transaction to be a mortgage and the other alleges it to be a sale, and the books of the defendant contain entries which support the case of the plaintiff, the burden of proof is shifted from the plaintiff to the defendant and it is for the latter to produce evidence to neutralize or explain away the effect of those entries : *Govinda* v. *Jesha Premaji*, I. L. R. 7 Bom. 73.

Accounts.

When a claim has been made under section 246 of Act VIII of 1859 by a third party to property attached under section 234, it is for the claimant to begin, and he must prove that the property belonged to him or was in his possession : *Ngæ Tha Zah* v. *Burn*, 2 B. L. R. F. B. 91 : 11 W. R. F. B. 8 ; *Govind Atmaram* v. *Santai*, I. L. R. 12 Bom. 270. But if he shows that a deed of sale had been executed in his favour by the judgment-debtors, that possession had been given to him, and that the consideration of the sale had passed, this is sufficient to shift the onus on to the defendant : *Digambari Dasi* v. *Beni Madhab Ghosh*, 15 W. R. 155. When a judgment-creditor has obtained a writ of attachment against the property of his judgment-debtor, but such debtor has no property against which the writ can be enforced, the judgment-creditor is entitled to an order for execution of his decree by attachment of the person of the debtor, and the burden of proof is on the latter to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, not on the creditor to show that by sending the debtor

Attachment.

to prison some satisfaction of the debt will be obtained (*Seton* v. *Bijoha*, 8 B. L. R. A. C. 255 : 17 W. R. 165). As to the burden of proof being on the person who alleges the non-observance of the formalities necessary to attachment, see *Ram Krishna Das Surrowji* v. *Sarfanissa Begam*, L. R. 7 I. A. 157 : I. L. R. 6 Calc. 129.

As to the burden of proof in cases of alleged *benami* purchases, the following cases may be consulted :—*Baijnath Sahai* v. *Raghunath Pershad Singh*, 12 C. L. R. 186 : *Bindu Basini Debi* v. *Piyari Mohan Basu*, 6 W. R. 312 : *Chandranath Rai* v *Ramjai Mazumdar*, 6 B. L. R. 303 : *Bazlúr Rahím* v. *Shamsúnissa Begam* and *Jadunath Basu* v. *Shamsunissa*, 11 Moo. I. A. 602 ; *Satyamani Dasi* v. *Bhagobati Charan Chatarji*, 1 C. L. R. 466 (The habit of holding land *benami* is inveterate in India, but that does not justify the Courts in making every presumption against apparent ownership) : *Deo Nath* v. *Pir Khan and Ramjan Khan*, 4 N. W. P. Rep. 16 (The burden of proof is on the person who maintains that the apparent state of things is not the real state of things) : *Liakat Ali* v. *The Court of Wards*, 10 W. R. 423 : *Hari Ram* v. *Raj Kúmar Upadhya*, I. L. R. 8 Calc. 759 : *contra*, *Jibannissa* v. *Amul Chandra Chaklanavis*, 18 W. R. 1 : 15 *Muktakeshi Debi* v. *Ananda Chandra Chatarji*, 2 C. L. R. 48. When a plaintiff claims to have purchased land from a *benamidar* in good faith in consequence of the *benamidar's* apparent title, it is for him to prove this plea : *Ruito Singh* v. *Bajrang Singh*, 13 C. L. R. 280. A purchased a *talúk* at a sale in execution of a decree obtained by a judgment-creditor. The assignee of another judgment-creditor, who had obtained a decree in a separate suit against the property, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bonâ fide*, being made in collusion with the judgment-debtors and *benami* for them. It was held that the burden of proof lay on the plaintiff to establish the affirmative issue that the money for the purchase of the *talúk* was supplied by the judgment-debtors, or by a third party for them, and not by the purchaser (*Srimanchandra Deo* v. *Gopal Chandra Chakravartti*, 11 Moo. I. A. 28 : 7 W. R. P. C. 10 ; and see *Rup Ram Das* v. *Sasiram Nath Karmokar*, 23 W. R. 141 : and *Feiz Baksh Chaudhri* v. *Fakirúdin Mahomed Ahasan Chaudhri*, 14 Moo. I. A. 234).

Benami transactions.

When a purchase of real estate is made by a Hindú in the name of one of his sons, the presumption of Hindú law is in favour of its being a *benami* transaction, and the burden of proof lies on the party in whose name it is purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate : *Gopi Kristo Gosain* v. *Ganga Prasad Gosain*, 6 Moo. I. A. 53. As to the onus of proof in the case of a Muhammadan purchasing in the name of his son, see *Ahmed Ali Khan* v. *Hardwari Mull*, 5 B. L. R. 578 : 14 W. R. P. C. 14 : 13 Moo. I. A. 395 ; also *Naginbhai* v. *Abdulla*, I. L. R. 6 Bom. 717.

But when money is deposited and entered in a man's books in the name of his son, no presumption arises in favour of the money being intended for the benefit of the son. A presumption of ownership will arise in favour of

the person who provides the funds: *Ashabai* v. *Haji Tyeb*, I. L. R. 9 Bom. 115. When a person sues for possession of land, and the defendant alleges that the plaintiff purchased the land *benami* for him, the onus is on the plaintiff to establish a *primâ facie* case, and the allegation of the defendant does not shift the burden of proof: *Hari Ram* v. *Raj Kumar Upadhya*, I. L. R. 8 Calc. 759.

Bonds.

Where the plaintiff sued upon a bond which recited the payment of the *consideration*, and the defendant admitted the execution of the bond, but denied the receipt of the consideration, it was held that it lay upon the defendant to show that the recital in the bond as to the payment of consideration was not correct (*Fulli Bibi* v. *Basirudin Midha*, F. B. 4 B. L. R. 56: 12 W. R. F. B. 25: *Sivaram Aiyar* v. *Samu Aiyar*, 1 Mad. H. C. Rep. 447: *Debi Persad* v. *Dadal Singh*, 3 Moo. I. A. 347 (explained in *Brajeswari Peshakar* v. *Budhanudin*, I. L. R. 6 Calc. 268: 7 C. L. R. 6): *Perladh Sen* v. *Badhu Singh*, 12 Moo. I. A. 275: *Ali Shah* v. *Amani Begam*, 19 W. R. 149: *Maniklal* v. *Ram Das Mazumdar*, 1 B. L. R. A. C. 92: 10 W. R. 132: *Jagat Chandra Chaudhri* v. *Bhagwan Chandra Falehdar*, 1 Marsh. Rep. 27: *Radhanath Banarji* v. *Jadunath Singh*, 7 W. R. 441: *Raghunath Das* v. *Lachmi Narain Singh*, 10 W. R. 407[1]: *Kuruful Koer* v. *Raj Kali Koer*, 17 W. R. 439. These rulings, however, do not govern cases to which The Dekkhan Agriculturists' Relief Act (XVII of 1879) applies: *Maloji Santaji* v. *Vithu Hari*, I. L. R. 9 Bom. 520. In a case in which the plaintiff in a suit on a bond accounted for not producing it by alleging that the defendant had stolen it, and the defendant admitted execution, but alleged that he had satisfied it, it was held that the defendant was bound to begin and to prove payment either by evidence to the fact, or by the production of the bond, or both: *Chuni Kuar* v. *Udai Ram*, I. L. R. 6 All. 73. In *Raj Kumar Singh* v. *Ram Sahai Rai*, 11 W. R. 151, the plaintiff sued on a deed which purported to be one of absolute sale. It was admitted that an *ekrar* had been executed in favour of the mortgagor reserving to him the equity of redemption. But the plaintiff produced this *ekrar*, and said it had been made over to him by the mortgagor who had relinquished the equity of redemption. It was held that the presumption of law was in favour of the plaintiff and that it lay on the defendant to prove its loss. In another case, in which the plaintiff sued on a bond, the defendant attempted to reduce the claim on the ground that the money had not been received in full, and endeavoured to substantiate this defence by calling for the books of the plaintiff, it was held that the burden of proof was entirely on the defendant. Their Lordships of the Privy Council said: "What the Subordinate Judge did was to look whether the items of

[1] The following cases are no longer law:—*Jhalu* v. *Farzand Ali*, 5 W. R. 203: *Rup Mangal* v. *Anand Rai*, 3 W. R. 11: *Ghansam Singh* v. *Chakauri Singh*, W. R. 1864, 197: *Makund* v. *Bahori Lal*, I. L. R. 3 All. 824 (Here the plaintiff first called his witnesses, and they proved that the consideration was not paid at the time of execution).

discharge in the plaintiff's books were corroborated or not. Where they were corroborated, he allowed the discharge, and where they were not corroborated, he disallowed them." In doing that their Lordships think that the Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the plaintiff had relied on his own books as proving his debt, which was not the case. The plaintiff relied on the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the defendant who seeks her defence in the books of the plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground: *Rajeswari Kuar* v. *Rai Bal Krishan*, I. L. R. 9 All. 713: L. R. 14 I. A. 142. When the plaintiff sued on a receipt admitting a payment, and the defendant admitted execution of the receipt, it was held to be on the defendant to prove that the statement of payment on the receipt was incorrect: *Devlata* v. *Ganesh Shastri*, I. L. R. 4 Bom. 295, and where the plaintiff sued on two bonds, and the defendant in his written statement as well as in his deposition admitted execution of the bonds, but pleaded non-receipt of consideration, it was held the question of execution could not be gone into, and that the only question which could be tried was non-receipt of consideration: *Gorakh Babaji* v. *Vithal Narayan Joshi*, I. L. R. 11 Bom. 435.

Where the plaintiff sued to set aside an usufructuary mortgage-deed perfected by possession, and alleged that this deed was executed to secure the amount of a previous indemnity-bond in favour of the mortgagees and for other purposes, that the conditions of this bond had not been complied with, and that therefore there was no sufficient consideration, it was held that it lay upon the plaintiff to make out the case alleged by him, and to establish at least a good *primâ facie* title to the relief prayed for, so as to cast on the defendants the burden of proving the consideration for the deed: and in the absence of clear and consistent evidence to prove the plaintiff's case the deed was sustained. It was observed that the proposition, that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying upon the instrument the burden of proving payment of that consideration, is too wide: and that a party who comes into Court to enforce a bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance (*Kali Persad Tewari* v. *Prahlad Sen*, 12 Moo. I. A. 282: 2 B. L. R. P. C. 122).

Boundary disputes.

Where a plaintiff seeks to establish his right to land by setting aside an award made by Government officers on a revenue survey and by showing that the boundary laid down by such officers is erroneous, the burden of proof is on him, and he must establish his allegations by independent evidence: (*Lelanand Singh* v. *Moheshar Singh*, 10 Moo. I. A. 81: 3 W. R. P. C. 19: *Lelanand Singh* v. *Mahendra Narain*, 13 Moo. I. A. 57: see also *Lelanand Singh* v. *Lachmanar Singh*, 10 C. L. R. 169. The Privy Council will not reverse the judgment of an Indian Court upon such a question of boundary, unless very clearly satisfied on the facts and evidence that the decision is wrong. In the latter of the two cases above quoted, it was said: "The suit is brought not only for the recovery of the lands, but, as a necessary step towards that object, to set aside certain awards passed by the officers employed to conduct the Revenue Survey in this district, and to obtain a rectification of the boundary line as defined by them. . . . . Their Lordships need hardly observe that the plaintiff in such a case has to overcome the strong presumption which the decision of such a question as this by competent officers after full local inquiry made with the aid of a scientific survey of the locality is calculated to raise against him." In a case of disputed boundary between a *lakhiraj* tenure and a zamindar's *mál* land, there is no presumption in favour of either party, and it lies upon the plaintiff to prove the case set up by him: *Bir Chandra* v. *Ram Gati Dutt*, 8 W. R. 209: *Gangamala Chaudhrain* v. *Madhab Chandra Nag*, 10 W. R. 413.

Lands admittedly situate within the boundaries of a zamindari are *primâ facie* to be considered as part of the zamindari; and it is for those who allege that they have been separated from the general lands of the zemindari and that they have been settled as a *shikmi* taluk to establish this allegation: *Wise* v. *Bhuban Mayi Debi*, 3 W. R. P. C. 5: 10 Moo. I. A. 165. When land is within the ambit of the plaintiff's zamindari and the defendants set up an adverse title by reason of an under-tenure, the burden of proof is on the defendant. But where the plaintiff admits that there is a howla within his zamindari and that the defendant has lands in that howla, but alleges that he has exceeded the boundaries of that howla, and has encroached upon his lands, the onus is on the plaintiff to show that the defendant has encroached: *Rhidai Kristo Mitra* v. *Nobin Chandra Sen*, 12 C. L. R. 457: see also *Nistarini* v. *Kali Prasad Das Chaudhri*, 23 W. R. 431. When the defendant has obliterated the old boundary mark, it is sufficient for the plaintiff to show the direction of the old boundary wall; and if any deviation is relied on by the defendant, it is for him to give precise proof of it: *Jadunath Mallik* v. *Kali Kisto Tagor*, 25 W. R. 524.

When a person alleged that a certain zamindari was an indivisible *raj*, and that he was entitled to succeed to the whole, it was held that it lay on him to prove these allegations (*Girdhari Singh* v. *Kulahal Singh*, 21 Moo. I. A. 344: 6 W. R. P. C. 1). The impartibility of a *raj* does not, as a matter of law, render it inalienable. Inalienability depends upon family custom, which must be

Custom.

proved by the person alleging it (*Anand Lal Singh Deo* v. *Gobind Narain Deo*, 5 Moo. I. A. 82: *Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*, L. R. 8 I. A. 248: I. L. R. 8 Calc. 199). When a person sets up a special or family custom of inheritance, restrictive of the law of the land or at variance with the law of the community to which he belongs, it lies on him to prove such custom (*Naiukhi Kuari* v. *Chaudhri Chintaman Singh*, 20 W. R. 247: *Hirbai* v. *Gorbai*, 12 Bom. H. C. Rep. 294: *Rahimatbai* v. *Hirbai*, I. L. R. 3 Bom. 34: *Mahendra Singh* v. *Jokha Singh*, 19 W. R. 211: *Thakur Jit Nath Sahi Deo* v. *Loknath Sahi Deo*, 19 W. R. 239: *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, I. L. R. 3 Bom. 273: *Adrishappa* v. *Gurushidappa*, I. L. R. 4 Bom. 494: *Ram Bharti Jagrupbharti* v. *Surajbharti Haribharti*, I. L. R. 5 Bom. 682: *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Habibhoy*, I. L. R. 12 Bom. 280: 13 Bom. 534). The burden of proving that the *vatandar joshi* of a village is not entitled to officiate and take fees in the families of any particular caste lies upon the persons asserting exemption (*Raja Valad Shivapa* v. *Krishnabhat*, I. L. R. 3 Bom. 232).

When a person relies on a local usage regulating the right to land, the subject of alluvion or diluvion (see s. 2, Ben. Reg. XI of 1825), the burden of proving such local usage lies upon him (*Rai Manik Chand* v. *Madhaam*, 13 Moo. I. A. 1).

Debtor and creditor.

When the defendant-raiyat in a suit for rent pleads payment, the burden of proof is on him (*Pareag Lal* v. *Ram Jewan Lal*, 1 W. R. 264: *Kunjú Bihari Banarji* v. *Mulkuranath Chaudhri*, 1 W. R. 155). When the defendant admits the cause of action and pleads discharge by payment, he must prove that the claim which is admitted has been discharged by payment (*Meherunnissa* v. *Abdul Ghani*, 17 W. R. 509). When a debtor pleads tender of payment as a ground for not being charged with interest, it lies on him to prove such tender (*Sharat Sundari Debya* v. *The Collector of Mymensingh*, 5 W. R. Act X, 69).

Declaration of title.

When a plaintiff comes into Court and asks for a declaratory decree confirming his title, he must prove the title which he seeks to have confirmed, and cannot have a decree on the mere ground that he is in possession and that the defendants have proved no better title (*Jolok Singh* v. *Gurwar Singh*, W. R. 167: *Rassonada Rayar* v. *Sitharami Pillai*, 2 Mad. H. C. Rep. 171: *Royes Mulah* v. *Madhu Sudhan Mandal*, 9 W. R. 154: *Parsid Narain Singh* v. *Bisseshar Dyal Singh*, 7 W. R. 148: *Madan Mohan Shaha* v. *Bharat Chandra Rai*, 11 W. R. 249). When a plaintiff sued for a declaration of her title to property of which the defendant was in possession, but of which she produced the title-deeds in favour of herself, it was held that the *onus* lay on the defendant to disprove the plaintiff's title (*Swarnomayi Raur* v. *Srinibash Koyal*, 6 B. L. R. 144). When the members of a temple committee appointed under Act XX of 1863, sued one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property and for other reliefs, it was held that the burden of proving that the temple was of the class

mentioned in the Act lay on the plaintiffs (*Ponduranga* v. *Nagappa*, I. L. R. 12 Mad. 366).

Deeds.

A suit to set aside a deed, although registered, on the ground that it is spurious or otherwise void will lie in the Civil Court; and when the plaintiff, the alleged executant, denies execution, the burden of proving its execution and its genuineness is cast upon the defendant (*Mahima Chandra Dhar* v. *Jugal Kishor Bhattacharji*, I. L. R. 7 Calc. 736: 9 C. L. R. 471).

Where a person contends for a particular construction of a document, which is not the *primâ facie* construction, and which is contrary to Hindu law and to the established custom of construing documents in the particular part of the country, the burden of proof lies on the person who contends that the contract should be governed not by general but by particular rules (*Taj Chand* v. *Srikanth Ghosh*, 3 Moo. I. A. 261). In the case of *Kissen Dutt Ram Panday* v. *Narendra Bahadur Singh* (L. R. 3 I. A. 85) a mortgagor sued for redemption. The mortgage-deed was lost, and the question was whether the *onus* lay on him to prove that the term did not expire before a certain date, or upon the mortgagee to prove that it did. The Privy Council were of opinion that it lay upon the plaintiff to substantiate his case by some evidence, by some *primâ facie* evidence at least. "But in this, as in most other cases," it was said, "when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *primâ facie* in this case, in their Lordships' view, is upon the plaintiff, still they think the consideration should not be omitted that the defendant would naturally have the mortgage-deed, and that it would be *primâ facie*, at all events more in his power to give accurate evidence of its contents than in that of the plaintiff. It is not a case in which two deeds, such as a lease and a counterpart, are executed, the plaintiff keeping one and the defendant the other, but it is a case in which it would appear that there was only one document, and that that would be, and was in this case, in the custody of the defendant. The plaintiff by the hypothesis would not have seen the document, or probably have had access to it from the time of its execution, whereas the defendant would be assumed to have it and to be able to produce it, or, if he could not produce it, to show why he could not, and to give some evidence of its contents if it were lost."

Easements.

In the case of an easement the burden of proof is upon the party claiming such a right, but in the case of natural rights the burden of proof will lie on the party alleging a right to restrain another from exercising them (*Hari Mohan Thakur* v. *Kishen Sundari*, I. L. R. 11 Calc. 52: *Omraet* v. *Krishna Sundari Dasi*, 15 W. R. 83). In *Abhai Charan Dè* v. *Lakhinani*, 2 C. L. R. 555, it was held that possession of an easement by order of a Magistrate would not establish a right to the easement or relieve the person claiming it of the *onus* of proving his claim. By this case a previous ruling to the contrary effect, *viz.*,

Pachai Khan v. *Abed Sirdar*, 21 W. R. 140 (see also *Hariram* v. *Bhikari Rai*, 25 W. R. 20) was overruled.

Fraud

It is a general rule that fraud cannot be presumed, and that the burden of proving that any transaction has been effected by fraud and misrepresentation lies upon the person seeking to impeach its validity on these grounds :—*Rajendra Narain Rai* v. *Bijai Gabind Sing*, 2 Moo. I. A. 181 : *Achanth Singh* v. *Kissen Persad Singh*, W. R. 1864, 37 : *Sahúdar Koer* v. *Jai Narain Singh*, 1 W. R. 326 : *Anand Mayi Debya* v. *Sibdyal Banwari*, 2 W. R. 2 : *Girish Chandra Chatarji* v. *Mohesh Chandra Nyalankar*, 10 W. R. 173 : *Ramgati* v. *Mumtaj Bibi*, 10 W. R. 280 : *Rudra Persad* v. *Binod Ram Sen*, 10 W. R. 321 : *Rúp Ram Das* v. *Sasiram Nath Karmokar*, 23 W. R. 141 : *Kabiran* v. *Safihan*, 24 W. R. 388 : *Sikar Chand* v. *Dalpati Singh*, I. L. R. 5 Calc. 363 : 5 C. L. R. 374 ; see also *Natha Singh* v. *Jodha Singh*, I. L. R. 6 All. 406, in which it was pointed out that when the plaintiff alleges that the fraud only came to his knowledge at a certain time it is for the defendants to prove that he was cognizant of it before that time. So the burden of proof lies upon a person who alleges that an instrument was obtained by duress, intimidation, &c. (*Motilal Upadhya* v. *Jagarnath Giri*, 1 Moo. I. A. 1 : *Purvatha Vurdhay Nauchiar* v. *Lingurera Ramakumara Yetapa Naicker*, 7 Moo. I. A. 441). The observations of their Lordships of the Privy Council in the case of *Jadunath Basu* v. *Shamsunissa Begam* (11 Moo. I. A. 602) may well be borne in mind in connection with this subject :—"The habit may be superinduced by the manifold cases of fraud with which they have to deal ; but Judges in India are, perhaps, somewhat too apt to see fraud everywhere."

Hindu law—burden of proof when partition is alleged.

Where a Hindú family is admitted or is shown to have been originally joint or living in a state of coparcenary, the presumption is that this state of union continues,[2] and that the ancestral property remains joint ; and this well established presumption of Hindú law can only be rebutted by showing that the family has been divided, and that the property has by partition or otherwise become separate, the burden of proving which fact lies on the party asserting them (*Chitha* v. *Minin Lal*, 11 Moo. I. A. 380 : *Ram Chandra Dutt* v. *Chandra Kumar Mandal*, 13 Moo. I. A. 181 : *Pran Kissen Pal Chaudhri* v. *Mathura Mohan Pal Chaudhri*, 10 Moo. I. A. 403 : *Kattama Nautchiar* v. *The Raja of Shivaganga*, 9 Moo. I. A. 543. *Bhagobati Misraim* v. *Doman Missey*, 24 W. R. 365. *Laximan Row Sadaseo* v. *Muller Row Baji*, 5 W. R. P. C. 67 : *Shiu Golam Singh* v. *Baran Singh*, 1 B. L. R. A. C. 164 : 10 W. R. 198 : *Amrit Nath Chaudhri* v. *Gauri Nath Chaudhri*, 6 B. L. R. 232 : *Bir Narain Sirkar* v. *Tinkauri Nandi*, 1 W. R. 316 (Suit by a member of the family for a share of the joint property—plea that property was formerly joint.

[2] It may be said that joint-tenancy is presumed by law to be the primary state of every Hindú family—see 1 Strange's Hindú Law, 225 : *Appovier* v. *Ram Subha Aiyan*, 11 Moo. I.A. 75 : *Nilkisto Deb Barmano* v. *Birchandra Thakur*, 12 Moo. I. A. 540.

but that partition had taken place—burden of proving partition held to lie on defendant): *Bissambhar Sirkar* v. *Suradhani Dasi*, 3 W. R. 21: *Manmohini Debi* v. *Sudhamani Debi*, id. 31: *Gura Persad Mukharji* v. *Kali Persad Mukharji*, 5 W. R. 121: *Trilochan Rai* v. *Raj Kissen Rai*, id. 214. But when it is neither proved nor admitted that the family are living together or have their entire property in common, a plaintiff seeking to recover property as ancestral estate must, under the general rule, prove the title set up by him (*Bannu* v. *Kashi Ram*, I. L. R. 3 Calc. 315: *Abhai Charan Ghosh* v. *Gobind Chandra De*, I. L. R. 9 Calc. 237: *Tulsidas Indha* v. *Premji Trikumdas*, I. L. R. 13 Bom. 61).

Where there has been partition, the burden of proving re-union is on the party alleging it (*Venkata Gopala Narainappa* v. *Lakshmi Venkama Rai*, 3 B. L. R. P. C. 11). So, if one of several brothers, who have separated in food and made a division of their estate, sues Court alleging that a particular portion of what was originally joint property has remained joint, notwithstanding the general partition, the burden of proof will lie on him (*Gobind Kumar* v. *Hussein Ali*, 7 W. R. 90). In a suit for possession of land in which the plaintiff admitted that there had been a previous partition between the under-sized landsecurt for had taken to the defendant, but alleged that the partition was only a temporary one, and that it had come to an end, it was held that it lay on the plaintiff to prove his claim (*Abhai Charan Sirkar* v. *Hari Nath*, I. L. R. 8 Calc. 72: 10 C. L. R. 81).

While a Hindu family remains joint, the presumption is that all the property, including acquisitions made in the name of a single member, is joint family property, and in consequence of this presumption the burden of proof lies on a member of a Hindu family who claims any portion of the property as self-acquired: *Yamanuda Venkayamah* v. *Yamanuda Bushia Vankondora*, 12 Moo. I. A. 333: *Rani Persad Tewari* v. *Sheobaran Das*, 10 Moo. I. A. 490: *Bihari Lala* v. *Madhu Persad*, 3 W. R. 59: *Nobo Pattan Kunoor* v. *Gour Kishori Chakrabarti*, 7 W. R. 446: *Gurdeo Pandey* v. *Phulkumari*, Bacy. 10 N. W. 22: 23: *Rahmat Begum* v. *Gulab Kunwar Rai*, 1 W. R. 234: *Sipro Persad Mujumdar* v. *Kanu Dugi*, 3 N. W. 82: *Bhaiji Kalu* v. *Gokuldas Vella*, I. L. R. 8 Bom. 151: *Anokhi Chowdhrani* v. *Bhagabati Chowdhrani*, 3 W. R. 173—suit for share in joint family property—I said that property was joint within period of limitation and allegation of separation. Held such plaintiff must show joint enjoyment within the period of limitation, which having been done, it lay on defendant to prove the alleged separation.[a] *Anand Mohan Rai* v. *Lalji*, N.-W. P. Rep. 169: *Jagadish Das* v. *Gangadhar Sil*, 1 Beng. Rep. 600: *Rain Singh* v. *Bhagwan Singh*, 4 N.-W. P. 102: *Nand Ram* v. *Chiter*, id. 257: *Deb*

[a] In *Gopal Das Kundu* v. *Sree Kumari Debi* (12 B. L. R. 219) it was laid down still more distinctly that a person suing for a share in joint family property must show, not only that the property is joint family property, but also that he has had possession of his share, or has received a division on account of it within twelve years.

Sahai v. *Sheo Dass Rai*, id. 285: *Gopi Kristo Gosain* v. *Ganga Persad Gosain*, 6 Moo. I. A. 53: *Chand Hari Maiti* v. *Narendro Narain Rai*, 19 W.R. 231: *Baronath Das Rai* v. *Goda Kolita*, 20 W. R. 343: see also *Bodh Singh Dudhuria* v. *Gonesh Chandra Sen*, 12 B. L. R., 317: 19 W. R. 356: and *Bholanath Mahta* v. *Ajudhia Nath Prasad Sukul*, 20 W. R. 65; 12 B. L. R. 336. In *Sukhbahdur Dasi* v. *Boloram Rewan*, W. R. Sp. No. 57, where the whole property was self-acquired, the burden of proof was held to lie on the person seeking a share and alleging the estate to be joint. When the plaintiff, a member of a Hindú family, sued for a division of the family estate, and admitted in his plaint that he had taken possession of part of the family property, and had for sixteen years lived separate, it was held that the *onus* lay on him to prove that the circumstances under which he became possessed of his share of the property were consistent with his statement that the family remained undivided: *Somangouda Dajamangouda* v. *Bharmangouda Lingamangouda*, 1 Bom. H. C. Rep. 43.

Hindú law—burden of proof when property is claimed as stridhan.

A person claiming under a deed of gift from a Hindú widow, and alleging the property, the subject of such gift, to be the widow's *stridhan*, must prove this (*Bhuddra Mani Dasi* v. *Jay Kissen Sirkar*, 1 W. R. 107): see also *Brajo Mohun Mahant* v. *Radha Kumari*, W. R. 1864, 60: *Bisseshar Chakravartti* v. *Ramjai Mazumdar*, 2 W. R. 326.

In cases of alienation by Hindú widow.

When a Hindú widow mortgages or alienates property, which, in the ordinary course of things, would descend to the reversionary heirs on her death, it lies upon those who derived their title from her to show that the alienation or mortgage was made for a purpose for which a Hindú widow is by Hindú law competent to charge the estate (*Canty Vencata Narrainapah* v. *The Collector of Masulipatam*, 11 Moo. I. A. 619: 19 W. R. P. C. 47: *The Collector of Masulipatam* v. *Canty Vencata Narrainapah*, 8 Moo. I. A. 500: 2 W. R. P. C. 75: *Gobind Mani Dasi* v. *Sham Lal Barsakh*, W. R. 1864, 153: *Gobind Chand Dasi* v. *Jai Kishen Sirkar*, 1 W. R. 107: *Bissonath Rai* v. *Lal Bahadur Singh*, 1 W. R. 241: *Ramdhan Bhattacharji* v. *Ishan Dass*, 2 W. R. 122: *Dhondo Ramchandra* v. *Bakrishna Govind Nagwekar*, I. L. R. 5 Bom. 193: *Lakshman Bhau Khopkar* v. *Radhabai*, I. L. R. 11 Bom. 132: *Ramjibhai Kalyandas* v. *Vinayak Vishnu*, I. L. R. 11 Bom. 666: *Mahomed Sharif Haq* v. *Sheoukram*, 22 W. R. 409). In *Rao Karan Singh* v. *Mahomed Ali Ali Khan* (10 B. L. R. 12: 14 Moo. I. A. 176), their Lordships of the Privy Council said:—"In such a case, whatever be the precise degree of proof required by those who rely upon the mortgage, there is no doubt that they, who take such a security from a person having only a limited power of alienation, are bound to show, *primâ facie* at least, that the money was raised for a legitimate purpose." The alienation of a portion of the estate by a Hindú widow in order to enable her to make a pilgrimage to Gya to perform her husband's *Sraddh* was held good and proper (*Mahomed Ashraf* v. *Brajessari Dasi*, 19 W. R. 428). But although acts of alienation for pious and religious purposes calculated to promote the spiritual welfare of

her deceased husband are valid, acts of alienation for her own spiritual welfare, or that of persons other than the deceased owner will be void (*Puran Dai* v. *Jai Narain*, I. L. R. 4 All. 482). A daughter, who takes her father's property on the death of the widow and in default of a son, is, in respect of alienation in no better position than the widow (*Deo Persad* v. *Lajn Rai*, 20 W. R. 102).

The lender to, or purchaser from, a Hindú widow is, however, not bound to see to the application of the money. It is sufficient if he satisfies himself as to the necessity for the loan: *Ram Gopal Ghosh* v. *Balloder Basu*, W. R. 1864, 385. *Ram Prasad Singh* v. *Naqbanshi Koer*, 8 W. R. 501. He does not lose his rights if upon a *bonâ fide* enquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist *Kameshwar Prasad* v. *Ran Bahadur Singh*, I. L. R. 6 Calc. 843; 8 C. L. R. 361; L. R. 8 I. A. 8. But a recital in a bond is not sufficient evidence of legal necessity: *Sankarlal* v. *Jadubans Sahai*, 9 W. R. 285: *Raj Lakhi Debia* v. *Gokul Chandra Chaudhri*, 12 W. R. P. C. 47. 3 B. L. R. P. C. 57. Where a Hindú widow sued to recover a share of property alienated by her husband's brother, it was held that the *onus* lay on the defendant to prove his allegation that the plaintiff had derived any benefit from the alienation. All the plaintiff had to do was to prove her title: anything derogating her title must be proved by the other side: *Srimati* v. *Lakhi Narain Datta*, 22 W. R. 171.

So, where the widow or other guardian of a Hindú minor alienates or charges the estate or any portion of it, the person relying upon this charge or alienation must show that there was a necessity therefor, or at least that he had good ground for supposing that the transaction was for the benefit of the minor (*Lalla Bansidhar* v. *Kúnwar Bindesari Dutt Singh*, 10 Moo. I. A. 454: *Hanúman Pershad Panday* v. *Babúi Manraj Kunwari*, 6 Moo. I. A. 393: and see *ante*, pp. 338, 339, and *Sheo Persad Singh* v. *Surjbans Koer*, 24 W. R. 281). The power of the manager for an infant heir to charge the estate is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not to be affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. If such danger has arisen from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Where it is not shown that the lender has acted *mala fide*, he will not be affected, although it be shown that with better management the estate might have been kept free from debt. The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is

In cases of alienation by manager for Hindú minor.

dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge; and under such circumstances he is not bound to see to the application of the money. Money to be secured on an estate being obtainable on easier terms than a loan which rests on mere personal security, the mere creation of a charge securing a proper debt is not to be viewed as mismanagement. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application; and a *bonâ fide* creditor, who has acted honestly and with due caution, ought not to suffer, should it turn out that he has himself been deceived. A lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate. If he prove, therefore, the circumstances of his own particular loan so as to show that he acted honestly, that he made due and proper inquiry, and that he had reasonable ground for believing that the transaction was for the benefit of the minor and his estate, he will sufficiently have discharged the burden cast upon him. Beyond this it is impossible to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bonâ fide*. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent upon them (*Hanuman Persad Panda* v. *Babui Manraj Kunwari*, 6 Moo. I. A. 419, 423 W. R 81 · *Radha Kishor Mukharji* v. *Milanjai Gow*, 7 W. R. 23 *Kameshwar Prasad* v. *Ran Bahadur Singh*, L. R. 8 I. A 8 · I. L. R. 6 Calc. 843 · 8 C. L. R. 361). In the latter case their Lordships said that they in no degree departed from the principles laid down in the case of *Hanuman Persad*: that they had applied those principles in recent cases not only to the case of a manager for an infant, but to alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara Law, has made an alienation of ancestral family estate see also *Maddun Thakur* v. *Kantu Lal*, *ante*, p. 339 (Decree is evidence of necessity to protect a purchaser at an execution sale): *Bazrang Sahai Singh* v. *Mantora Chaudhrain*, 22 W. R. 119 · *Rup Narain Singh* v *Gangadhar Persad Narain*, 9 W. R. 297: *Nand Kumar Singh* v. *Ganga Persad Narain Singh*, 10 W. R. 94: *Lulu Singh* v. *Rajendra Laha*, 8 W. R. 364 · *Bhuran Koer* v. *Sahebzadi*, 6 W. R. 149: *Umacharan Banarji* v. *Haradhan Mazumdar*, 1 W. R. 347: *Jagdel Narain Sahai* v. *Lalla Ram Prakash*, 2 W. R. 292 · *Dagdú* v. *Kamble*, 2 Bom. Rep. 369: *Sarab Narain Chaudhri* v. *Sheo Gobind Panday*, 11 B. L. R. App. 29: *Ranjit Ram Kulal* v. *Mahomed Waris*, 21 W. R. 49 (Digging a tank not a legal necessity for alienation): *Mathúra Das* v. *Kant Bihari Singh*, 21 W. R. 287 (Suit by minor to set aside alienation by guardian—purchase-money had

been applied to minor's benefit—held that minor should refund the purchase-money less the rents and profits received by alienee); *Sikhar Chand* v. *Dalpati Singh*, I. L. R. 5 Calc. 363; 5 C. L. R. 374 (Alienation by guardian appointed under Act 40 of 1858).

Alienation by father of family governed by Mithila or Mitakshara Law.

In the case of *Giridhari Lal* v. *Kantu Lal* (L. R. 1 I. A. 328; 14 B. L. R. 187; 22 W. R. 59) the facts were as follow:—The family was governed by the Mithila Law, and the ancestral property descended from K L, who died in the year 1250. Upon his death his two sons, B L and B S, were the only persons interested in the property. In 1251, a son, *Kantu*, was born to B L. In 1256 an execution under a decree obtained on a bond executed by B L had issued, and his "right and share" in the family dwelling-house had been attached. Money was required to pay off this decree, and in consequence a portion of the ancestral property was sold by a deed of sale, dated the 28th July 1856, and executed by B L and B S. *Kantu*, upon coming of age, brought a suit, not to recover his share in the property, because under the Mithila Law, which resembled the Mitakshara, he had no distinct or definite share to recover, but to recover the *whole property*, upon the ground that the sale by the fathers was void, because at the time of such sale *Kantu* had been born, and by reason of his birth had acquired an interest in the property, and that the whole property conveyed by the fathers ought to be brought back again to be joint property for the benefit of the whole family. Their Lordships remarked that it was questionable whether a son could, under the Mitakshara Law, recover an undivided share of ancestral property sold by his father; but thought it unnecessary to determine that question, because they were of opinion that, under the circumstances, the plaintiff was not entitled to recover any portion of the estate. They held that upon the authorities ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his debts because a son is born to him; that the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts; that if the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it, and might possibly object to the ancestral property being made liable for such a debt; that in the case before them it had not been shown that the bond upon which the decree was obtained had been given for an immoral purpose; that it was a bond given apparently for an advance of money, upon which an action had been brought; that it had been substantiated in a Court of Justice, and there was nothing to show that it had been given for an immoral purpose, and the holder recovered a decree upon it. Under those circumstances they decided that the plaintiff was not entitled to set aside the deed of sale, evict the purchasers, and recover possession of the property. In this case the burden of proof was regarded as lying upon the plaintiff. In *Adarmani Devi* v. *Chaudhri Sib Narain Kar* (I. L. R. 3 Calc. 1) the plaintiff sued to recover possession of a *mauza*, which he alleged to be

his ancestral property and to have been alienated by his father without legal necessity. The Mitakshara Law was held to govern the family. The lower Courts held the alienation not to be binding upon the plaintiff because the defendant had failed to prove legal necessity for such alienation. *Markby, J.*, said:—"Whatever may have been once thought in this Court, I do not think that after the decision of the Privy Council in *Girdhari Lal* v. *Kantu Lal*, it can be said that this is the right way of dealing with such a case. There was certainly at one time a disposition in this Court to treat the father as having no power whatever to bind his son by his disposition of the ancestral property of the family except in cases where the son was a minor, and there was a legal necessity to dispose of the property, putting therefore the father, as regards his minor son's interest in the property, in the same position as a guardian. The effect of this view of the position of the father under the Mitakshara Law, coupled with the decision of the Full Bench in the case of *Sadabart Prasad Sahu* v. *Fulbash Koer*"* (3 B. L. R. F. B. 31), "that no member of a Mitakshara family can dispose even of his own share, was practically to enable the son to set aside *in toto* all alienations of the family property made during his minority unless the alienee could show that the alienation was one which was really necessary for the preservation of the interests of the family. But the Privy Council in the case of *Girdhari Lal* v. *Kantu Lal* have taken an entirely different view of the position of the son under the Mitakshara Law. Proceeding upon a decision of the Sadr Diwani Adálat, they have practically put the son in the same position with respect to debts contracted by his father, as if he had succeeded to the ancestral estate as heir upon the death of his father. They say—'It would be a pious duty to pay his father's debts; and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts.' And they infer from this that an alienation made to satisfy such debt of the father is binding on the son. Applying these principles to the present case, it appears to me that the true question for consideration is, not whether there was any legal necessity for the sale of this property, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid by him, the son would under the Hindú Law be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then I think, according to

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* It was decided in this case that one co-sharer in a Mitakshara family has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account and not for the benefit of the family. This decision was considered by the Privy Council in *Dindyal Lal* v. *Jagdip Narain Singh* (L. R. 4 I. A 252: I. L. R. 3 Calc. 198: before the High Court, 20 W.R. 174), in which case it was held that assuming that such a share cannot be alienee by voluntary alienation, yet in Bengal, as in the other two Presidencies, it can be taken and sold in execution against the co-sharer alone, and the purchaser is entitled to have such share and interest ascertained by partition. On this latter point see also *Suraj Bansi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88.

the Privy Council's decision the sale is valid; and I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that under the Hindú Law he is not liable . . . . Upon the question of *onus* I have had more doubt. One would be inclined to think that the party alleging immorality was bound to prove it. Probably, however, the question of *onus* is one which must be determined according to the circumstances of each particular case. But I have no doubt whatever that, under the circumstances of this case, the *onus* ought to be placed upon the plaintiff. The transaction took place a very long time ago, and the plaintiff attained his majority seven or eight years before he took any steps to set this purchase aside. I think it would be a grievous injustice to allow him now to do this, unless he can show affirmatively that the transaction is one which the law renders void."

In *Suraj Bansi Koer* v. *Sheo Prasad Singh* (L. R. 6 I. A. 88), the facts were these:—A S, the sole owner of ancestral immoveable property governed by the Mitakshara or Mithilá Law, in 1870, when he had two minor sons alive, borrowed Rs. 13,000 from B, and executed in his favour a bond whereby a portion of the ancestral immoveable property was pledged as security for the payment of the loan. In 1872 B brought a suit upon this bond against A S and obtained an *ex parte* decree, which directed that the amount decreed should be realized by the sale of the mortgaged property. During the execution-proceedings A S died, and these proceedings were revived against his sons. Their mother, as guardian on their behalf, presented a petition to the Court on the 14th July 1873, objecting to the attachment and sale. This petition was rejected by an order to the effect that the objection could not be heard in the execution department; but that if the petitioners had any interest in the property, apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The property was accordingly sold. The minors then brought a suit by their mother as next friend against the execution-creditor and the purchasers to have the mortgage-bond, the judgment and execution sale set aside, and to restrain the purchasers from taking possession of the property. Their claim to relief was founded on the rights which, under the Mitakshara Law, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber or waste that property, and the plaint contained charges of immoral and extravagant conduct on the part of A S. The Courts in India treated the case as one in which the burden of proof lay upon the plaintiffs, and the Privy Council expressed no dissent. The plaintiffs proved that there was no justifying necessity for the mortgage, and all the Courts were agreed that the plaintiffs were entitled to relief against the execution-creditor. The Privy Council further held, reversing the decree of the High Court, that they were entitled to relief against the purchasers at the execution-sale, who had taken with notice of the objections made on behalf of the minors. As to the undivided share of A S, it was however, held that this could be seized and sold in execution and that the effect of

the sale was to transfer this share to the purchasers with the same power of ascertaining it by partition which A S possessed in his lifetime.[s]

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[s] In connection with the same subject the following cases may be consulted:—*Hanuman Dutt Rai* v. *Kissen Kissor Narain Singh*, F. B. 8 B. L. R. 358 (Son, suing to set aside alienation made by father during his minority without legal necessity, held entitled to declaration not only that alienation was void as an alienation of the entire estate but also that it was void to the extent of the share; but see *Dindyal Lal* v. *Jagdip Narain Singh*, *note* on page 474): *Mahabir Persad* v. *Ram Yad Singh*, 12 B. L. R. 90; 20 W. R. 192 (Mortgage without justifying necessity by father and one son A, when second son, B, was a minor; mortgagees obtained decree on mortgage-bond, brought the family property to execution-sale and themselves purchased; suit by A and B to set aside the alienation, dismissed as to A, who had joined in the transaction, successful as to B; purchasers allowed to enforce their lien upon the shares of the father and of A, which course was approved by the Privy Council in *Dindyal Lal* v. *Jagdip Narain Singh*): *Parsid Narain Singh* v. *Hanuman Sahai*, I. L. R. 5 Calc. 845 (A, a father having a wife, an adult son, and a minor son, mortgaged a portion of the ancestral estate; mortgagee sued A alone, obtained a decree and in execution sold and himself bought A's right, title, and interest in the mortgaged property, of the whole of which he took possession; in suit by widow and both sons against mortgagee, held that defendant failing to prove justifying necessity took A's share only): *Lachman Das* v. *Giridhar Chaudhri*, F. B. I. L. R. 5 Calc. 855 (Case of managing member of joint Mitakshara family raising money, there being no proof, on the one side, of legal necessity, or, on the other side, of immorality): *Lalji Sahai* v. *Fakir Chand*, I. L. R. 6 Calc. 135 (Antecedent debt: liability of son): *Uparup Tewari* v. *Lalia Bindhji Sahai*, I. L. R. 6 Calc. 749 (Antecedent debt satisfied out of money raised by mortgage; adult member of family not a party to the mortgage not bound): *Gobardhan Lal* v. *Singessar Dutt Koer*, I. L. R. 7 Calc. 52 (Debt incurred for joint family purposes by member of family who died after decree and before execution-sale; remedy of the other members): *Ganga Persad* v. *Ajudhia Persad Singh*, I. L. R. 8 Calc. 131; 9 C. L. R. 417 (Ancestral property liable for debt contracted by father for personal (not immoral) purposes): *Ramphal Singh* v. *Deg Narain Singh*, I. L. R. 8 Calc. 567; 10 C. L. R. 489 (Suit by son to recover property sold during his minority by father; burden of proof on plaintiff to show that debt was incurred for illegal or immoral purpose): *Ambika Prasad Tewari* v. *Ram Sahai Lal*, I. L. R. 8 Calc. 898; 10 C. L. R. 505 (What passes by sale in execution of decree against father alone?): *Sheo Prasad* v. *Jang Bahadur*, I. L. R. 9 Calc. 389; 12 C. L. R. 494 (*idem*): *Ram Dutt Singh* v. *Mahendro Prasad*, I. L. R. 9 Calc. 452 (Alienation by father for lawful purposes; decree in suit to which sons were not parties): *Baso Koer* v. *Hari Das*, I. L. R. 9 Calc. 495; 12 C. L. R. 292 (Debts incurred in joint family trade; family property mortgaged by certain members of the family in order to pay them; decree in suit, to which adult sons not parties): *Jotadhari Lal* v. *Raghubir Persad*, 12 C. L. R. 255 (Father, defendant in suit, died while appeal was pending; eldest and only adult son prosecuted appeal; family property held liable for costs): *Sitanath Koer* v. *Land Mortgage Bank of India*, I. L. R. 9 Calc. 888; 12 C. L. R. 574 (Mortgage by father and sons; decree obtained against them; other sons resisted execution against family property; suit by mortgagee to enforce lien against other sons): *Jamuna Persad Singh* v. *Dig Narain Singh*, I. L. R. 10 Calc. 1 (Remedies open to person who lends money to member of Mitakshara family for purposes binding on the joint family): *Durga Persad* v. *Kesho Persad*, P. C. 11 C. L. R. 210 (Liability of infant): *Ponnappa Pillai* v. *Pappuvayyangar*, F. B. I. L. R. 4 Mad. 1 (Obligation upon son to pay undivided father's debt: its nature and extent; son not concluded by decree in suit to which he was not a party): *Ganguta* v. *Anoha Bapulu*, F. B. I. L. R. 4 Mad. 73 (Purchaser from undivided father, when resisted by minor coparcener, must show that debt was such as minor was bound to discharge): *Sivasankara Mudali* v. *Parvati Anni*, F. B. I. L. R. 4 Mad. 96 (*Bonâ fide* purchaser of ancestral property sold in execution of decree against father how far protected against sons): *Sundraraja Ayyangar* v. *Jaganada Pillai*, I. L. R. 4 Mad. 111 (Mortgage debt contracted for family

In *Lekraj Rai* v. *Mahtab Chand* (14 Moo. I. A. 393 : 10 B. L. R. 42), A was the principal manager of S, a banker, and after the death of S, continued to manage the business, which was conducted in the name of the widow and L, the infant son of S. A adopted B, the infant son of his brother C, and by will appointed C and D guardians of his adopted son. S died in 1845, and C and D obtained a certificate under Act XX of 1841. In 1846 the widow of S, as guardian of her infant son L, sued C and D to recover from the estate of A Rs. 1,76,152, which amount A was alleged to have misappropriated. After the case had partly proceeded, C and D compromised and paid Rs. 74,000. B came of age in 1861, and in 1863 sued L to recover the amount so paid, alleging that the suit of 1846 was fictitious, and that the compromise was fraudulent and collusive between his guardians and the

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purposes; ancestral property sold in execution of decree obtained upon this mortgage; son not entitled to sue for his share on ground that he was no party to the suit): *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti*, I. L. R. 5 Mad. 37 (Undivided Hindú family engaged in trade; decree against father; second suit not maintainable to make undivided sons' property liable): *Velliyammal* v. *Katha Chetti*, I. L. R. 5 Mad. 61 (Where purchaser at sale under decree against father has got possession of the whole property, son cannot recover his share without proving that debt for which decree was made was illegal or immoral): *Subramaniyayyan* v. *Subramaniyayyan*, F. B. I. L. R. 5 Mad. 125 (Elder of two brothers during minority of younger renewed mortgage executed by father for purposes neither illegal nor immoral; mortgagee sued elder brother; decree; sale in execution; minor son held not bound, and therefore entitled to recover his share of the property on payment of half the debt): *Gurusami Sastrial* v. *Ganapatha Pillai*, I. L. R. 5 Mad. 337 (Suit against father for specific performance of contract to sell ancestral property; proof of necessity must be required): *Mutayyan Chetti* v. *Sangili Vira Pandia Chinnatambiar*, L. R. 9 I. A. 128 : I. L. R. 6. Mad. 1 (Interest in impartible zamindari, which son takes by heritage from father, is liable as assets by descent for the payment of father's debts): *Venamandra Sitaramasami* v. *Midalana Sanyasi*, I. L. R. 6 Mad. 400 (Mortgagee in possession of part of the family estate made party to suit by one brother against his two brothers to recover his one-third share; no proof that mortgage-debt, which was contracted by father, was for benefit of family or that it was for illegal or immoral purpose; mortgage held binding on father's one-fourth share only): *Arunachala Chetti* v. *Munisami Mudali*, I. L. R. 7 Mad. 39 (Decree against father upon mortgage-bond; attachment of family property; shares of sons released upon their objection; suit by decree-holder to make such shares liable; burden of proof held to be on him to prove justifying necessity): *Dhuli Chand* v. *Man Singh*, I. L. R. 4 All. 309 (Mortgage by father for necessary purpose; adult son was aware but did not protest; decree against father alone; property sold in execution, objection by son being rejected; suit by son for his share; held that son could not succeed unless he could show that mortgage-debt was for illegal or immoral purpose): *Ujagar Singh* v. *Pitam Singh*, L. R. 8 I. A. 190 (Right of son in father's share in Government grant): *Hanuman Kamat* v. *Daulat Mandar*, I. L. R. 10 Calc. 528 (Sale by father of Mithila family; antecedent debts): *Hurdey Narain Sahu* v. *Kuar Prakash Misser*, L. R. 11 I. A. 26 (Purchaser of father's right, title, and interest): *Hanuman Singh* v. *Nanak Chand*, I. L. R. 6 All. 133 (Father's debts; burden of proof): *Mahabir Prasad* v. *Basdeo Singh*, I. L. R. 6 All. 234 (Decree against father—sons not liable for the particular debt): *Ramakrishna* v. *Namasivaya*, I. L. R. 7 Mad. 295 (Decree against father: family property attached: sons' shares released: suit by decree-holder to have such shares declared liable to be sold): *Baba* v. *Timma*, I. L. R. 7 Mad. 357, F.B. (Power of father to alienate his undivided share to a stranger).

widow of S. In the District Court and High Court B succeeded, but the Privy Council, placing the burden of proof on him, held that he had failed to prove the fraud and collusion alleged by him, and reversed the decree obtained in India. Their Lordships said :—"There is no allegation of fraud against the defendant, who at the time of the transaction, which is impeached, was a child ten years old. The plaintiff took upon himself the burden of establishing fraud and collusion on the part of the defendant's mother and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the defendant to show that such dealing was for the infant's benefit; and the case of *Hanuman Persad Panday* v. *Babui Manraj Kunwari*, followed by *Lalla Bansidhar* v. *Kunwar Bindeseri Dutt Singh*, was referred to in *support of this proposition*. But it is to be observed that in the latter case fraud on the part of the guardian was clearly established, and that in the former the question turned on the power of guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who were also administrators of the estate (having received a certificate in pursuance of Act XX of 1841), to pay all just debts of the testator . . . . . It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer, if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt, confirmed by a decree of a Court, were to be set aside after sixteen years without distinct proof of fraud . . . . . Their Lordships . . . are of opinion that the Judge of the Zillah Court fell into an error in point of law in assuming that the burden of proof of the debt lay upon the defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the plaintiff."

The subject has been further considered in the cases of *Nanomi Babuasin* v. *Madan Mohan*, I. L. R. 13 Calc. 21; L. R. 13 I. A. 1: *Bhagbat Prasad Singh* v. *Girja Koer*, I. L. R. 15 Calc. 717; L. R. 15 I. A. 99: *Ponnapa Pillai* v. *Pappuvayyangar*, I. L. R. 9 Mad. 343: *Sitaram* v. *Zalim Singh*, I. L. R. 8 All. 231: *Lal Singh* v. *Dev Narain Singh*, I. L. R. 8 All. 279: *Jamna* v. *Nain Sukh*, I. L. R. 9 All. 493: *Badri Das* v. *Madan Lal*, I. L. R. 15 All. 75: *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas*, I. L. R. 11 Bom. 27: *Chintamanrao Mehendale* v. *Kashinath*, I. L. R. 14 Bom. 320: and *Khalilul Rahaman* v. *Gobind Prasad*, I. L. R. 20 Calc. 328. The result of these cases seems to be that under the Mitakshara Law a son is always liable for his father's debts, and cannot set aside an alienation for these debts unless they have been contracted for improper and immoral purposes. It is immaterial whether the alienation has taken place at a sale in execution of a decree obtained against the father, or whether the debt was one antecedent

to the sale or merely one antecedent to the suit. Moreover, it is not sufficient to show merely that the father was a person of extravagant or immoral habits. The onus is always on the son to establish some connection between the debt and the father's immoralities: *Hanuman Singh* v. *Nanak Chand*, I. L. R. 6 All. 193; *Sitaram* v. *Zalim Singh*, I. L. R. 8 All. 231; and *Sadashiv Dinkar* v. *Dinkar Narayan*, I. L. R. 6 Bom. 520.

The authority of the *sebait* of property dedicated to the worship of an idol (*dewuttur*) is analogous to that of the manager of an infant heir as set forth in the above passage in the judgment in the case of *Hanúman Persad Panday* v. *Babúi Manraj Kunwari*. In *Prasanna Kumari Debi* v. *Golab Chand* (14 B. L. R. 458; L. R. 2 I. A. 145) the Privy Council said:—"But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the *sebait* of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples, or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debt must be measured by the existing necessity for incurring them . . . . . It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as sebait or manager. It would seem to follow that the person so entrusted must, of necessity, be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them. Assuming, then, that a sebait may incur debts or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former sebait in respect of debts so incurred should be binding upon succeeding sebaits, who in fact form a continuing representation of the idol's property. If such debts and the judgments founded on them were not held to be thus binding on successors, the consequence would be, that no sebait would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors, who had afforded it, by at once transferring the property to other sebaits." That the sebait of an idol's estate has the same right, or an analogous right, to that of the manager of an infant heir, was again laid down by the Privy Council in *Kunwar Durganath Rai* v. *Rajn Chandra Sen* (L. R. 4 I. A. 63; I. L. R. 2 Calc. 341), where, as regards another point, it was observed that the burden of proof lies upon the person who alleges that property has been inalienably conferred upon an idol to sustain its worship; and that very strong and clear evidence of such an endowment ought to exist. See also, on the subject of alienation by a sebait, *Shibessari Debi* v. *Malhâranath Acharjya*, 13 Moo. I. A. 270: *Jai Lal*

Alienation by Sebait of Dewuttur property.

Tewari v. *Bhúban Ghr*, 21 W. R. 334: *Narayan* v. *Chintaman*, I. L. R. 5 Bom. 393: *Collector of Thana* v. *Hari Sitaram*, I. L. R. 6 Bom. 546: and *Shankar Bharti Svami* v. *Venkapa Naik*, I. L. R. 9 Bom. 422. There is no presumption that every debt contracted by the *karnavan* of a Malabar *tarwàd* is for the uses of the *tarwàd* and chargeable on the *tarwàd* estate, and the creditor must show that the *karnavan* had authority from the *tarwàd* to contract the debt (*Kutti Mannadiyar* v. *Payanu Muthan*, I. L. R. 3 Mad. 288).

Hindú Law. Inheritance.

When a person claimed property as a *sebaíi*, the rule of succession intended by the founder not being clear, and the ordinary rule of succession not being followed, it was held that it lay on him to prove the special rule of succession on which he relied (*Janoki Debi* v. *Gopal Acharjya*, I. L. R. 9 Calc. 766: 13 C. L. R. 30). Where it is sought to prevent the possession of the legal Hindú heir and to change the usual course of inheritance on the alleged ground of an adoption having been made, it lies upon the party setting up this title against the entrance of the legal heir to prove the adoption, both as regards the power of the adopter and also as regards the fact of the adoption if it be questioned (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, 7 B. L. R. A. C. 159; 11 W. R. 468. This was a strong case, the heir being the plaintiff in a suit to recover possession, and having alleged fraud, of which no proof was given): *Bisseshar Chakravartti* v. *Ramjai Mazumdar*, 2 W. R. 326: *Thakúrdin Tewari* v. *Ali Hossein Khan*, L. R. 1 I. A. 192: 13 B. L. R. 427: 21 W. R. 340 (Here the suit was also to set aside certain deeds, and the plaintiff produced *primâ facie* evidence to challenge them): *Ram Pratab Misra* v. *Abilak Misra*, 3 C. L. R. 170: *Teriet put Singh* v. *Gosain Sujersan Das*, I. L. R. 4 Calc. 46: and *Chaudhri Padam Singh* v. *Koer Ojey Singh*, 12 Moo. I. A. 350. Where a plaintiff sets up a title as collateral heir, he must prove this title through the common ancestor in all its stages (*Kedarnath Das* v. *Pratab Chandra Das*, 8 C. L. R. 238: I. L. R. 6 Calc. 626: *Kali Kishor Gupta Mazumdar* v. *Bhusan Chandra*, I. L. R. 18 Calc. 201: L. R. 17 I. A. 159. Where the reversionary heir sued *in the lifetime of the widow* for a declaration that an adoption made by her was invalid, it was held that it lay on him to prove such invalidity (*Brajo Kishori Dasi* v. *Srinath Basu*, 9 W. R. 463). So, where the suit was brought, not for relief by obtaining possession of the property, but for a declaration of title, the Court being asked to declare an adoption, which had long taken place and been acted upon, to be fraudulent and false (*Gúrú Prasanno Singh* v. *Nil Madhab Singh*, 21 W. R. 84). See also *Herasoitulla* v. *Brajo Sundar Rai*, 18 W. R. 77: *Hardyal Nag* v. *Rai Krishto Bhumik*, 24 W. R. 107. A Hindú widow sued her husband's uterine brother for her husband's share. Held that the burden of proof was on the brother, who pleaded that deceased was a *leper* and not entitled to inherit (*Nalit Chandra Gáhú* v. *Bagola Sundari Dasi*, 21 W. R. 249). See also *Sakumat Bibi* v. *Waris Ali*, 22 W. R. 400, where a *wasiyatnama* or will was set up in answer to a claim for a share by inheritance. When the Government claims as an escheat lands admittedly in the possession of the party

claiming as heir, the burden of proof is on the Government to show that the last proprietor died without heirs (*Giridhari Lal Rai* v. *The Government of Bengal*, 10 W. R. P. C. 31 : 1 B. L. R. P. C. 44).

The natural heirs of a person who has been taken as *illatam* into another family are *primâ facie* entitled to succeed to the property acquired by the deceased by virtue of his *illatam* marriage, and the burden of proving any special circumstances to rebut their claim lies on the persons who raise this plea : *Rama Krishna* v. *Subbaiha*, I. L. R. 12 Mad. 442.

Lakhiraj grants of land.

Proprietors of land in the Bengal Presidency are concerned with two classes of *lakhiraj* or revenue-free grants of land, *viz.*, I—Grants *made previous to the 1st December*, 1790, *and not exceeding one hundred bighas*, the revenue of which (when adjudged invalid) was, by section 6, Ben. Reg. XIX of 1793, made over to the persons responsible for the discharge of the revenue of the estate within the limits of which the lands are situate. The gift of this revenue was an act of liberality on the part of Government, inasmuch as these grants had been expressly excluded from the Decennial and Permanent Settlements. The former *lakhiraj*-holder was not dispossessed, but was allowed to hold the land as a dependent *talúk*, subject to the payment of revenue. II—Grants *made after the 1st December*, 1790, *and whether exceeding or under one hundred bighas*. These grants (unless made by the Governor-General in Council) were declared to be in all cases null and void, and, as they had been included within the limits of permanently-settled estates, the proprietors of such estates were, by section 10 of the Ben. Reg. XIX of 1793, authorized and required to *dispossess* the alleged grantees, annex the lands to their estates, and collect the rents thereof. With respect to the *first class*, proprietors were expressly required by law (section 11, Reg. XIX of 1793) to institute suits in the Civil Courts for the recovery of the revenue made over to them by Government. With respect to the *second class*, proprietors were formerly allowed to dispossess the alleged revenue-free holders, but the difficulty of doing so induced resort to the Courts in these cases also ; and finally this resort was made compulsory (section 28 of Act X of 1859). There is, however, an important difference as respects the burden of proof in each class of cases. In the first class, or where the allegation is that the *lakhiraj* tenure was created before the 1st December, 1790, the burden of proof is on the alleged *lakhirajdar* or person setting up the revenue-free title (*Umesh Chandra Rai* v. *Dakhina Sundari Debya*, W. R. Sp. No. 95 (Suit for resumption); *Rádhá Krishna Singh* v. *Rádhá Mínghi*, Sev. Aug.—Dec. 1863, 366 (Suit for resumption) ; *Lalla Siblal* v. *Ghulam Nabi*, Marsh. Rep. 255 (Purchaser of *lakhiraj* tenure at sale in execution) ; *Hira Lal Paramanik* v. *Barikunissa Bibi*, I. L. R. 3 Calc. 501 ; *Kailas Basini Dasi* v. *Gokul Mani Dasi*, I. L. R. 8 Calc. 234 ; 10 C. L. R. 41 ; and clause 3, section 3, Ben. Reg. XIV of 1825. But see *Forbes* v. *Mir Mahomed Hossain*, 20 W. R. 44 ; 12 B. L. R. 210. In such cases the zamindar's right to resume is subject to the 12 years' rule of limitation. In the second class of cases, on the other hand, or when the allegation is that the *lakhiraj* tenure was created *after the*

1st December, 1790, the burden of proof is on the zamindar or proprietor to show that the land claimed as *lakhiraj* is part of his *mâl* or *rent-paying* estate, and was assessed with the public revenue at the time of the Decennial Settlement *Parbati Charan Mukhapadhya* v. *Raj Krishno Mukhapadhyay*, B. L. R. Sup. Vol. F. B. 165: *Harihar Mukhapadhyay* v. *Madhab Chandra* and *Nabo Krishna Mukhapadhya* v. *Kailas Chandra Bhattacharjya*, 14 Moo. I. A. 152: 8 B. L. R. 566: 20 W. R. 459 *Mahomed Aktar* v. *Reily*, 24 W. R. 447. *Arfunissa* v. *Piyari Mohan Mukharji*, I.L.R. 1 Calc. 378, 25 W. R. 209. (Here it was held that a purchaser at a sale for arrears of Government revenue is in no better position than any other proprietor). This is generally done by showing that rent has been paid for the land in question at some period subsequent to 1790: *Khelal Chandra Ghosh* v. *Purna Chandra Rai*, 2 W. R. 258: *Bihari Lal Rai* v. *Kali Das Chandra*, 8 W. R. 451 *Shamda Ali* v. *Mathuranath Datto*, 14 W. R. 226.

Lands situate within the limits of a *zamindâri* are *primâ facie* considered to be a part of such zamindari; and those who allege that they are entitled to have any such lands settled as a separate *shikmi taluk* must make out this title (*Wise* v. *Bhûban Mayi Debya*, 10 Moo. I. A. 165; 3 W. R. P. C. 5; and see *Nistarini* v. *Kali Persad Das Chaudhri*, 23 W. R. 431). But in *Bir Chandra* v. *Ram Gati Datto*, 8 W. R. 209, it was said that in a question of boundary between a *lakhiraj* tenure and a zamindar's *mâl* land, there is no presumption one way or the other, but it is manifestly for the plaintiff to prove his case; while in *Bishnath Chaudhri* v. *Radha Charan Ganguli*, 20 W. R. 165, it was remarked that the mere fact of land falling within the geographical limits of an estate does not of itself show that such land is *mâl* land.

Where, however, the alleged *lakhirajdar* comes into Court as plaintiff to obtain a decree declaratory of his *lakhiraj* title, the burden of proof is on him to prove this title, and no proof of possession for years, unless carried back previous to 1790, will shift the burden to the zamindar (*Ram Jiban Chakravartti* v. *Pershad Shar*, 7 W. R. 458). This case must be distinguished from *Man Mohini Dasi* v. *Jaikissen Mukharji* (W. R. Sp No. 174), in which the zamindar had ousted the alleged *lakhirajdar* without resorting to the Courts; and, when the latter brought his action to recover possession, it was held that the burden of proving the land to be *mâl* or rent-paying lay on the zamindar. To have decided otherwise would have been to allow the zamindar by his own wrongful act to shift the burden of proof. Under section 87 of The North Western Provinces Land Revenue Act, XIX of 1873, any person claiming land free of revenue, not recorded as revenue-free, is bound to prove his title to hold such land free of revenue.

See also *Budha Mudha* v. *Khairat Ali*, 5 W. R. 269: *Pertab Chandra Singh* v. *Sib Das Kayet*, 1 W. R. 111 *Jaikissen Mukharji* v. *Piyari Mohan Dutt*, 8 W. R. 160 *Gobardhan* v *Tofail*, 6 W. R. 190 *Ram Lal Das* v. *Uma Charan Das*, Sev. Aug.—Dec. 1863, 704 · *Uma Sundari* v. *Kishori Mohan Banarji*, 8 W. R. 238. For further information on the subject of *lakhiraj* tenures, see the author's edition of the *Bengal Regulations*, pp. 36, 245—261.

As to claims to hold rent free, in the case of *Akbar Ali* v. *Bhyea Lal Jha*, I. L. R. 6 Calc. 666 : 7 C. L. R. 497, it was decided that the burden of proof was on the landlord when the land is held by a person not a tenant of the plaintiff for other land, or when such land is occupied as a separate parcel or holding, or otherwise in such a manner as to be entirely distinct from other lands held by the same person as a tenant under the plaintiff. When the land is occupied by a tenant of the zamindar and is not distinguished in the manner described above from the rest of the land on which tenancy is admitted, the burden of proof is on the tenant. This ruling was modified in *Beharam Mandal* v. *Piari Mohan Banarji*, I. L. R. 9 Calc. 813: 12 C. L. R. 475, where the burden of proof is placed on the raiyat, only if the land in dispute is in the ambit of the rent-paying land held by him, but not if it is merely in the ambit of the estate where he has a rent-paying holding. With regard to the burden of proof to be discharged by the landlord, it was said that he must prove that the land in dispute is part of the *mâl* land of his estate, and this he could do either by proof of the receipt of rent for it, or that its proceeds were taken into account at the Permanent Settlement or by any other sufficient means. He must first make out such a *primâ facie* case that he would be entitled to a decree if the defendant failed to produce rebutting evidence. This ruling was followed in *Narendra Narain Rai* v. *Bishen Chandra Das*, I. L. R. 12 Calc. 182, in which it was said that in a suit for the resumption of lands, when the defendant alleges that the land is *lakhiraj*, the *onus* is on the plaintiff, in the first instance, to show that the lands are *mâl*, and if he fails to make out a *primâ facie* case, the suit should be dismissed. The production of a *lakhiraj* sanad is not necessary to prove land to be rent-free. The fact may be legally established by evidence of long and uninterrupted possession without payment of rent which would raise the presumption that the land had been held rent-free from the date of the decennial settlement or of twelve years' adverse possession. —*Dhanpat Singh* v. *Rasomayi Chaudhrani*, 10 W. R. 461.

Claims to hold land rent-free.

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[7] See also the following cases —*Hira Lal Sil* v. *Pitombar Mandal*, Sev. Aug.—Dec. 1863, 171: *Mahabir Persad* v. *Amrao Singh*, 1 N.-W. P. Rep. Civ. Rul, 167 (Case by a zamindar under section 28, Act X of 1859). *Parsidh Narain Singh* v. *Bissessar Dyal Singh*, 7 W. R. 148 (Suit by zamindar to obtain a declaration that land, sold in execution as *lakhiraj*, was his *mal* land): *Parmi Persad Ghosh* v *Kalicharan Ghosh*, Marsh. Rep. 215 (Suit to recover possession of 93 *bighas* of land held as *lakhiraj*, but asserted by plaintiffs to belong to their rent-paying villages): *Harihar Mukharji* v. *Abbas Ali Khan*, Sep. Rep. Aug.—Dec. 1863, 875 *Ahmed Reza* v. *Inayat Hossein*, 1 W. R. 330): *Gunnan Kazi* v. *Harihar Mukharji*, F. B. W. R. Sp. No. 115, and Marsh. Rep. 523 (Suit for enhancement of rent—defence that part of the land was *lakhiraj*) *Moti Lal Adak* v. *Jadopati Das*, 2 W. R. Act X, 44 (Similar to last case): *Bissessur Chakravartti* v. *Umacharan Rai*, 7 W. R. 44 (Similar). *Mirtanjai Chakravartti* v. *Baruakani Rai*, 6 W. R. Act X, 45 (Similar): *Ashrafunnissa* v. *Umang Mohan Deb Rai*, 5 W. R. Act X, 48 *Jagadeshari Debi* v. *Gadadhar Banarji*, 6 W. R. Act X, 21: *Guru Persad Rai* v. *Jagabandhu Mazumdar*, W. R. Sp. No. 15 (This was a suit for a *kabuliat*, and a Full Bench held that, the tenant having admitted that plaintiff was his landlord for a portion of the land, this was sufficient *primâ*

Landlord and tenant.

The *onus* of proof, when the question arises as to whether a tenure has been held from the time of the Permanent Settlement or not, will ordinarily lie on the tenure-holder, who raises the plea (*Gopal Lal Thakur* v. *Tilak Chandra Rai*, 10 Moo. I. A. 183: 3 W. R. P. C. 1). But where it is found that a *taluk* is a dependent *taluk* within the purview of section 51, Reg. VIII of 1793, the burden rests upon the plaintiff-zamindar to show that the rent is variable (*Bama Sundari Dasi* v. *Radhika Chaudhurani*, 13 Moo. I. A. 248: 4 B. L. R. P. C. 8: 13 W. R. P. C. 11). There is no presumption that any tenure held is not a transferable tenure; and a landlord, who sues for *khas* possession on the ground that a tenure sold was not transferable, must establish his case as an ordinary plaintiff (*Daya Chand Shaha* v. *Ananda Chandra Sen*, I. L. R. 14 Calc. 382): but in a more recent case in which the defendant pleaded that his tenure was of a permanent and transferable nature, it was held that the onus of proving its transferability was upon the defendant (*Kripa Mayi Debi* v. *Durga Govind Sirkar*, I. L. R. 15 Calc. 89).

When a landlord sues his tenant for enhancement of the rent previously paid by him, the burden of proof is on the landlord to establish the ground. In a suit for enhancement, where the defendant replies that the land in question does not belong to the plaintiff's estate, the *onus* is on the plaintiff (who seeks to dispute the previously existing arrangement) to prove his right to do so (*Mahomed Ali* v. *Radha Ramun Mandal*, 4 W. R. Act X, 18.) In a suit for enhancement of rent in respect of land, which the defendant claimed to hold as a dependent *taluk*, it was held that the onus was upon the zamindar to show that the land was included in the zamindari at the

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facie evidence of his being plaintiff's raiyat to throw upon him the burden of proving his special plea of *lakhiraj* as to the remainder. "Otherwise," it was said, "every raiyat might meet every rent case by a false plea of proprietary title"): *Nowaz Bandopadhya* v. *Kali Prasanno Ghosh*, I. L. R. 6 Calc. 343: 8 C. L. R. 7 (Suit for enhancement; plea that part of the lands included in the notice are rent-free): *Nihal Chandra Mistri* v. *Hari Persad Mandal*, 8 W. R. 183 (Suit for enhancement of rent—plea and *primâ facie* evidence that part of the land was *lakhiraj*): *Sib Narain Rai* v. *Chidam Das*, 6 W. R. Act X, 45: *Ram Kumar Ghosal* v. *Debi Persad Chatarji*, 6 W. R. Act X, 87: *Dhan Mani Debya* v. *Satargan Sil*, id. 100: *Gangadhar Singh* v. *Bimola Dasi*, 5 W. R. Act X, 37: *Mahomed Azsur Ali* v. *Nasir Mahomed*, 3 B. L. R. A. C. 304 (Plea that all the *mal* land had been relinquished, and that residue was *lakhiraj*): *Sridhar Nandi* v. *Braja Nath Kunda Chaudhri*, 2 B. L. R. A. C. 211: 14 W. R. 286 (Similar to last case; defendant raiyat should give some *primâ facie* evidence that land is really *lakhiraj*): *Malangini Debya* v. *Mahomed*, alias *Buri Miah*, W. R. 1864, Act X, 30: *Rajkissen Mukharji* v. *Jaikissen Mukharji*, id. 119: *Hira Ram Bhattacharjya* v. *Ashraf Ali*, 9 W. R. 103: *Pradhan Gopal Singh* v. *Bhup Rai Ojha*, 9 W. R. 570: *Ramnath Singh* v. *Haro Lal Panday*, 8 W. R. 188 (Suit for a *kabuliyat*): *Raj Kishor Mukharji* v. *Harihar Mukharji*, 10 W. R. 117: *Mar Mohan De* v. *Sricam Ram Rai*, 14 W. R. 285. If the defendant raiyat pleads that part of the land is *lakhiraj*, but does not point out what part, the plaintiff cannot be called upon to discharge the burden of proof until he does so (*Satta Charan Ghosal* v. *Tarini Charan Ghosh*, 3 W. R. 178). A similar rule has been applied to *chaukidari chakeran* land, and long possession has been held to throw upon the zamindar the burden of proving that the lands in suit were the private lands of the zamindar, and were not set apart at the Decennial Settlement as *chaukidari chakeran* (*Mukta Keshi Debi Chaudhrain* v. *The Collector of Moorshedabad*, 4 W. R. 30. See also *Forbes* v. *Mir Mahomed Taki*, 13 Moo. I. A. 438).

time of the Permanent Settlement (*Ahsanullah* v. *Bassarat Ali Chaudhuri*, I.L.R. 10 Calc. 920). In a suit to recover arrears of rent from the defendants, who, as *thikadars* of the plaintiff's share in a certain mauzah, had been in possession from 1262 to 1281 without having paid any rent, the plaintiff, who claimed a *bhaoli* rent at the rate of 9 annas of the crop, proved that in the mauzah in question the raiyats paid rent at that rate, and it was held that under the particular circumstances the *onus* was on the defendants, who alleged that the proper rate was 8 annas, to prove their allegation (*Lochan Chaudhri* v. *Anup Singh*, 8 C.L.R 426). In a suit to recover arrears of rent at enhanced rates, the *onus* of proving both the quantity and the rates is, upon the plaintiff and not upon the defendant (*Ghulam Ali* v. *Gopal Lal Tagor*, 1 W R. 56; 9 W.R. 65). The *onus* of proving the proper rate is upon the plaintiff, and not upon the defendant. (*Samira Khatun* v. *Gopal Lal Tagor*, 1 W.R. 58). With the above ruling should be read section 109, which provides that when the question is whether persons are landlord and tenant or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they have ceased to stand to each other in those relations respectively is on the person who affirms it.

When the defendant in a suit for arrears of rent claims abatement for a portion of the land said to have been diluviated, the burden of proving the diluvion is on him (*Savi* v. *Abhai Nath Basu*, 2 W. R. Act X, 27). So, when the defendant in a suit for arrears of rent alleges remission, it lies on him to prove such remission (*Banwari Lal* v. *Furlong*, 9 W. R. 239). When one shareholder sues for a fractional portion of the entire rent, and it is pleaded that the entire rent is payable together, it lies on the plaintiff to show that he is entitled to payment of his fractional portion separately (*Lalan* v. *Hemraj Singh*, 20 W. R 76). A raiyat claiming protection from ejectment by a purchaser at a sale for arrears of Government revenue must prove the ground (section 37, Act XI of 1859) on which he claims such protection (*Doman Lal* v. *Padman Singh*, W. R. 1864, Act X, 129); and so must a tenure holder (*Rash Bihari Basu* v. *Hara Mani Debya*, I. L. R. 15 Calc. 555): The same rule applies to cultivating tenants who seek to protect themselves from ejectment on the ground that their tenure is of a permanent character: *Thagaraja* v. *Gnana Sambandha Pandara Sannadhi*, I. L. R. 11 Mad. 77. The burden of proving actual receipt and enjoyment of rent lies on the person intervening in a rent-suit (*Kishen Chandra Das* v. *Barati*, 2 W. R. Act X, 36: *Ram Bharose Singh* v. *Jeva Mahatun*, 11 W. R. 319) *Radha Kishor Talukdar* v. *Golak Chandra Rai*, 11 W. R 366. The onus of proving land to be *sir*, or proprietor's private land, lies upon the person who alleges it to be so. *Hari Das* v. *Ghansham Narain*, I. L. R. 6 All. 286 When a raiyat held lands of considerable extent under a zamindar, and alleged that one or two plots were held under a different title, the burden of proving this allegation was cast upon him (*Ram Kumar Rai* v. *Bijai Gobind Baral*, 7 W. R. 535). And when a raiyat who had paid rent for four or five years, pleaded that he had got possession of portion only of the lands demised, it was held that the *onus* was on him *Beni Madhab Mukharji* v. *Sridhar Deb Ghatak*,

10 C. L. R. 535. In a suit by a *kabulayatdar khot* for rent of land in a *khoti* estate, the *onus* is not on the plaintiff to prove the land to be *khoti*, but on the holder of the land to show that he is exempted from paying rent according to the custom of the country (*Muhammad Yakoub* v. *Muhammad Ismail*, 9 Bom. H. C. R. 278).

Limitation.

Where a plaintiff sues to recover immovable property and is met with the plea of limitation, the burden of proof is on him to show that he has been in possession at some time within the period of limitation, *i.e.*, the period allowed by law after the cause of action has arisen for bringing a suit upon such cause of action. (*Nidressar Singh* v. *Nand Lal*, 8 Moo. I. A. 199; 1 W. R. P. C. 51 · *Prahlad Sen* v. *Buahu Singh*, 12 Moo. I. A. 337 *Bir Chandra* v. *The Deputy Collector of Bhulloosh*, 13 W. R. P. C. 23 : *Dinobandhu Sahai* v. *Furlong*, 9 W. R. 155 : *The Collector of Rungpore* v. *Prasanno Kumar Thakur*, 5 W. R. 115 : *Jagadamba Chandhrain* v. *Ram Chandra Deo Bakshi*, 6 W. R. 327 : *Bramanand Gosain* v. *The Government*, 5 W. R. 136 : *Buli Singh* v. *Harobans Narain Singh*, 7 W. R. 212 : *Nazir Sidhi Nazir Ali Khan* v. *Umesh Chandra Mitra*, 2 W. R. 75 : *Mirza Muhammed Hossein* v. *Sarahatunissa Khanum*, 2 W. R. 89 *Hari Das Rai* v. *Haronath Rai*, 2 W. R. 246 : *Ram Lochan Chaudhri* v. *Jai Durga Dasi*, 11 W. R. 283 : *Ranjit Singh* v. *Schoene, Kilburn*, 4 C. L. R. 390 . *Gosain Das Kundu* v. *Sera Kumari Debi*, 19 W. R. 192 (Suit for share in joint family property) : *Bhutnath Chatarji* v. *Kedarnath Banarji*, I. L. R. 9 Calc. 125 *Moro Desai* v. *Ram Chandra Desai*, I. L. R. 6 Bom. 508 ; *Ram Chandra Narayan* v. *Narayan Mahadev*, I. L. R. 11 Bom. 216 : *Tulsi Prasad* v. *Raja Misr*, I. L. R. 14 Calc. 610 : *Mohima Chandra Mazumdar* v. *Mohesh Chandra Neogi*, I. L. R. 16 Calc. 473 ; L. R. 16 I. A. 23 *Parmanand Misr* v. *Sahib Ali*, I. L. R. 11 All. 438. *Jafar Husain* v. *Mashuk Ali*, I. L. R. 11 All. 193. This general rule is not affected by a presumption which has been raised in an exceptional class of cases, in which, when land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that this state naturally would, and probably did, continue till within twelve years before suit, it has properly been presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown (*Mahomed Ali Khan* v. *Abdul Ghani*, F. B. I. L. R. 9 Calc. 744 ; 12 C. L. R. 257).[a] For example, where in a suit to recover alluvial land which

[a] In this case it was said that possession is not necessarily the same thing as actual user ; that the nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes, as by residence, or tillage or receipt of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation ; it may produce some profit but trifling in amount, and only of occasional occurrence, as is often the case with *jangal* land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. See also the remarks upon the same subject in *Alau Mohan Ghosh* v. *Mathura Mohan Rai*, I. L. R. 7 Calc. 225 ; 8 C. L. R. 126 . and in *Lord Advocate* v. *Lord Lovat*, L. R. 5 App. Cas. 288.

had been diluviated more than twelve years before the institution of the suit, the plaintiff's proved their title and possession up to the time of diluviation, such possession was presumed to continue during the submergence and after the reformation until the possession of some other party was shown (*Man Mohan Ghosh* v. *Mathura Mohan Rai*, I. L. R. 7 Calc. 225; 8 C. L. R. 126[9]; *Kali Charan Sahu* v. *The Secretary of State for India in Council*, I. L. R. 6 Calc. 725; 8 C. L. R. 90). In the case of *Radha Gobind Rai* v. *Inglis* (7 C. L. R. 364), the plaintiff claimed certain land included within the limits of a *bhil* or lake. The land so claimed had become dry and culturable during at least a part of the year. The plaintiff was found to be entitled not merely to the right of fishery in the water, but also to the soil of the *bhil*. The proprietor of a neighbouring *talúk* was the defendant, and he denied the plaintiff's title to the soil of the *bhil* and *relied upon adverse possession for more than twelve years before the institution of the suit*. Their Lordships of the Privy Council said:—"The question remains, whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted so as to give him the title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title: the defendant must prove that the plaintiff has lost it by reason of his, the defendant's, adverse possession. The High Court came to the conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment." There is apparently nothing to show that the plaintiff had exercised acts of possession in the dried up soil of the *bhil*, but it was clear that he had been in possession so long as the land was covered with water; and their Lordships of the Privy Council observed that the Judge in the Court of First Instance did not appear to have had his attention directed to the very important question, when the new land formed. The dates of the drying up of the land and of its occupation by the defendant were in controversy, but both had beyond doubt happened recently. It would appear that the defendant took upon himself the burden of proving a title by twelve years' adverse possession before the institution of the suit; and as he failed to prove such title, the plaintiff was entitled to succeed, having proved a good title to the water and the land, and possession while the land was under water.[1] In *Rao Karan Singh* v. *Bakar Ali*

[9] From this case may be distinguished *Gokul Kristo Sen* v. *David* (23 W. R. 443), where the land had been submerged, and after its reappearance in 1271 the plaintiff had never been in possession. This being so, the plaintiff's suit failed, because he did not prove *secundum allegata* that his vendor had been in possession before the land disappeared or was diluviated. Apparently the Court thought that if he had succeeded in proving that he or his vendor was in possession before the diluviation, his cause of action would have arisen when, upon the reappearance of the land, he was prevented by the defendant from resuming actual possession. See also *Mahomed Ibrahim* v. *Morrison*, I. L. R. 5 Calc. 36.

[1] In this case it would appear as if the Privy Council had gone so far as to lay down that in suits for the possession of land, when the title of the plaintiff is admitted or established, the burden of proof is on the defendant,

Khan (L. R. 9 I. A. 99; I. L. R. 5 All. 1) the facts were these:—B. S. and G. S. were brothers and joint owners of ancestral immoveable property. G. S. became insane, and during his life his son I. S. agreed to a partition of the immoveable property, by which *mauzah* K. fell to B. S. I. S. died, leaving an only son C. B. S. died, leaving an only daughter, who married D. and had two sons, A. and B. C., during the minority of A. and B., asserted a claim to the share of B. S., contending that, under a customary rule of succession, the male line excluded the daughter's son. In 1860 the Collector took possession of *mauzah* K. in order to secure payment of the Government revenue. In 1861 C. brought a suit against the mother of A. and B., which was dismissed. In 1863 he brought a second suit against the minor's their mother being dead; and on a reference to arbitration, an award was made in favour of C., who obtained possession of K. in October 1863. In order to defend these suits in the interest of the minors, D. borrowed money upon a mortgage of K. The alleged custom of succession not having been proved, it was finally decided that A. and B. were entitled to the property left by B. S., including *mauzah* K. The mortgagee brought a suit in June 1874 against A. and B. and C. as being in possession of K., to enforce his lien. C. pleaded that he had been twelve years in possession and had acquired a good title as against the mortgagee. In order to make up the period of twelve years he sought to add the Collector's possession to his own possession since 1863, but it was held that he could not do this. Their Lordships of the Privy Council said:—"It was contended that the plaintiff must prove that he was in possession within the period of twelve years; but when their Lordships come to consider the present Law of Limitation, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law[2] it may be brought within twelve years from the time when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. His possession since 1863 was not twelve years' possession: but it is contended

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and various attempts have been made to reconcile it with their Lordships' earliest decision in *Netressur Singh v. Nundo Lal Singh*, 8 Moo. I. A. 199; 1 W. R. P. C. 51. See *Kali Charan Sahu v. Secretary of State*, I. L. R. 6 Calc. 725; 8 C. L. R. 90; *Man Mohun Ghosh v. Mathura Mohan Rai*, I. L. R. 7 Calc. 225; 8 C. L. R. 126; *Mahomed Ali Khan v. Abdul Ghani*, I. L. R. 9 Calc. 744; 12 C. L. R. 257; *The Secretary of State v. Viraraghavan*, I. L. R. 9 Mad. 175; and *Moro Desai v. Ramchandra Desai*, I. L. R. 6 Bom. 598, in which latter case the Bombay High Court solved the difficulty by observing that in their opinion the Privy Council in this case did not mean to interfere with the general rule that when a plaintiff claims land from which he has been dispossessed, the burden is upon him to prove possession and dispossession within twelve years, or at least that the cause of action arose within that period.

[2] Article 145 of the second Schedule of Act IX of 1871 (to which corresponds article 144 of the second Schedule of Act XV of 1877), by which the period of limitation for suits for possession of immoveable property or any interest therein not otherwise by the Act specially provided for was declared to be *twelve years* from the time when the possession of the defendant [or of some person through whom he claims] became adverse to the plaintiff. The words in brackets have been omitted in the present Act.

that he was justified in adding or tacking to his possession the possession of the Collector from 1861. . . . . The defendant *does not claim through the Collector*, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863." The effect of this decision was considered in *Gopal Chandra Chakravartti* v. *Nilmani Mitra* (I. L. R. 10 Calc. 374), where it was argued that it had overruled the decision of the Full Bench in *Mahomed Ali Khan* v. *Khaja Abdul Ghani*, *ante*, p. 486. It was, however, pointed out that the case before the Privy Council was not brought to recover possession as upon a dispossession, and that article 143[a] of the second Schedule of Act IX of 1871 did not apply. It may be observed that in this case, as in the case of *Radha Gobind Rai* v. *Inglis*, the defendant had set up a title by twelve years' adverse possession. When the suit is between a vendee and his vendor, the onus is on the latter to prove adverse possession: *Niamatulla* v. *Nana*, I. L. R. 13 Bom. 424: *Ram Prasad Jana* v. *Lakhi Narain Pradhan*, I. L. R. 12 Calc. 197. When the plaintiff is admitted to be landlord, the onus is on the defendant to prove an adverse holding for more than twelve years, and that the plaintiff has had notice of such adverse holding: *Ugra Kant Chaudhri* v. *Mohesh Chandra Sikdar*, 10 C. L. R. 40. In a suit to recover possession of certain property from plaintiff's vendor, who made no real defence to the suit, a third party came in and claimed the property and was made a defendant. The burden of proof as against the plaintiff was held to lie on such intervenor (*Jagadanand Misser* v. *Hamid Rasul*, 10 W. R. 52).

When in execution of a decree obtained by A against B, formal (though it may not be actual) possession has been given to A, B cannot afterwards in support of a plea of limitation rely, as against A, upon the possession which he had before the transfer of possession by execution (*Jagabandhu Mukharji* v. *Ram Chandra Baisakh*, F. B. I. L. R. 5 Calc. 584: *Ambika Charan Gupto* v. *Madhab Ghosal*, I. L. R. 4 Calc. 870: *Ganga Gobind Mandal* v. *Bhupal Chandra Biswas*, 19 W. R. 101: *Mozaffar Wahid* v. *Abdus Samad*, 6 C. L. R. 539: *Lokessar Koer* v. *Pargan Rai*, I. L. R. 7 Calc. 418).

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[a] This article (to which corresponds article 142 of the second Schedule of Act XV of 1877) provides for suits for possession of immoveable property, when the plaintiff, while in possession, has been dispossessed, or has discontinued the possession, twelve years *from the date of the dispossession or discontinuance*. In the above case of *Gopal Chandra Chakravartti* v. *Nilmani Mitra*, the plaintiff had purchased a house and premises from the Official Assignee on the 25th February 1881. The property was said to have belonged to A, against whom D and Co. had obtained a decree for Rs. 23,000. D and Co. becoming insolvent, the decree vested in the Official Assignee: he attached the property; whereupon B, the brother of A, preferred a claim to it, which was dismissed. The plaintiff's suit was against B and certain tenants, who according to plaintiff's allegation held under A; but according to their own allegation they held under B. Limitation being pleaded, it was held that the plaintiff was bound to prove that he or some one under whom he claimed had been in possession of the property within twelve years before the institution of the suit. In *Gobind Lal Sil* v. *Debendronath Mallik* (7 C. L. R. 181), it was said that the terms "discontinue," "discontinuance" in article 142 apply only to cases where the owner of land has, either by his own act or that of another, been deprived altogether of his dominion over the land itself or the receipt of the profits.

Khan (L. R. 9 I. A. 99; I. L. R. 5 All. 1) the facts were these:—B. S. and G. S. were brothers and joint owners of ancestral immoveable property. G. S. became insane, and during his life his son I. S. agreed to a partition of the immoveable property, by which *mauzah* K. fell to B. S. I. S. died, leaving an only son C. B. S. died, leaving an only daughter, who married D. and had two sons, A. and B. C., during the minority of A. and B., asserted a claim to the share of B. S., contending that, under a customary rule of succession, the male line excluded the daughter's son. In 1860 the Collector took possession of *mauzah* K. in order to secure payment of the Government revenue. In 1861 C. brought a suit against the mother of A. and B., which was dismissed. In 1863 he brought a second suit against the minor's their mother being dead; and on a reference to arbitration, an award was made in favour of C., who obtained possession of K. in October 1863. In order to defend these suits in the interest of the minors, D. borrowed money upon a mortgage of K. The alleged custom of succession not having been proved, it was finally decided that A. and B. were entitled to the property left by B. S., including *mauzah* K. The mortgagee brought a suit in June 1871 against A. and B. and C. as being in possession of K., to enforce his lien. C. pleaded that he had been twelve years in possession and had acquired a good title as against the mortgagee. In order to make up the period of twelve years he sought to add the Collector's possession to his own possession since 1863, but it was held that he could not do this. Their Lordships of the Privy Council said:—"It was contended that the plaintiff must prove that he was in possession within the period of twelve years; but when their Lordships come to consider the present Law of Limitation, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law[2] it may be brought within twelve years from the time when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. His possession since 1863 was not twelve years' possession: but it is contended

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and various attempts have been made to reconcile it with their Lordships' earliest decision in *Netressar Singh* v. *Nando Lal Singh*, 8 Moo. I. A. 199; 1 W. R. P. C. 51. See *Kali Charan Sahu* v. *Secretary of State*, I. L. R. 6 Calc. 725; 8 C. L. R. 90; *Man Mohun Ghosh* v. *Mathura Mohan Rai*, I. L. R. 7 Calc. 225; 8 C. L. R. 126; *Mahomed Ali Khan* v. *Abdul Ghani*, I. L. R. 9 Calc. 744; 12 C. L. R. 257; *The Secretary of State* v. *Vira Rayan*, I. L. R. 9 Mad. 175; and *Moro Desai* v. *Ramchandra Desai*, I. L. R. 6 Bom. 508, in which latter case the Bombay High Court solved the difficulty by observing that in their opinion the Privy Council in this case did not mean to interfere with the general rule that when a plaintiff claims land from which he has been dispossessed, the burden is upon him to prove possession and dispossession within twelve years, or at least that the cause of action arose within that period.

[2] Article 145 of the second Schedule of Act IX of 1871 (to which corresponds article 144 of the second Schedule of Act XV of 1877), by which the period of limitation for suits for possession of immoveable property or any interest therein not otherwise by the Act specially provided for was declared to be *twelve years* from the time when the possession of the defendant [or of some person through whom he claims] became adverse to the plaintiff. The words in brackets have been omitted in the present Act.

that he was justified in adding or tacking to his possession the possession of the Collector from 1861. . . . . The defendant *does not claim through the Collector*, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863." The effect of this decision was considered in *Gopal Chandra Chakravartti* v. *Nilmani Mitra* (I. L. R. 10 Calc. 374), where it was argued that it had overruled the decision of the Full Bench in *Mahomed Ali Khan* v. *Khaja Abdul Ghani*, *ante*, p. 486. It was, however, pointed out that the case before the Privy Council was not brought to recover possession as upon a dispossession, and that article 143[a] of the second Schedule of Act IX of 1871 did not apply. It may be observed that in this case, as in the case of *Radha Gobind Rai* v. *Inglis*, the defendant had set up a title by twelve years' adverse possession. When the suit is between a vendee and his vendor, the onus is on the latter to prove adverse possession: *Niamatulla* v. *Nana*, I. L. R. 13 Bom. 424; *Ram Prasad Jana* v. *Lakhi Narain Pradhan*, I. L. R. 12 Calc. 197. When the plaintiff is admitted to be landlord, the onus is on the defendant to prove an adverse holding for more than twelve years, and that the plaintiff has had notice of such adverse holding: *Ugra Kant Chaudhri* v. *Mohesh Chandra Sikdar*, 10 C. L. R. 40. In a suit to recover possession of certain property from plaintiff's vendor, who made no real defence to the suit, a third party came in and claimed the property and was made a defendant. The burden of proof as against the plaintiff was held to lie on such intervenor (*Jagadanand Misser* v. *Hamid Rasul*, 10 W. R. 52).

When in execution of a decree obtained by A against B, formal (though it may not be actual) possession has been given to A, B cannot afterwards in support of a plea of limitation rely, as against A, upon the possession which he had before the transfer of possession by execution (*Jagabandhu Mukharji* v. *Ram Chandra Baisakh*, F. B. I. L. R. 5 Calc. 584; *Ambika Charan Gupto* v. *Madhab Ghosal*, I. L. R. 4 Calc. 870; *Ganga Gobind Mandal* v. *Bhupal Chandra Biswas*, 19 W. R. 101; *Mozaffar Wahid* v. *Abdus Samad*, 6 C. L. R. 539; *Lokessar Koer* v. *Pargan Rai*, I. L. R. 7 Calc. 418;

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Ranjit Singh v. *Banwari Lal Sahu*, I. L. R. 10 Calc. 993: *Shama Charan Chatarji* v. *Madhab Chandra Mukharji*, I. L. R. 11 Calc. 93. *Gopal Das* v. *Than Singh*, I. L. R. 4 All. 184: *Mohinudin* v. *Manchershah*, I. L. R. 6 Bom. 650 and *Venkatramanna* v. *Viramma*, I. L. R. 10 Mad. 17. This principle does not, however, apply to *third* parties (*Doyanidhi Panda* v. *Kelai Panda*, 11 C. L. R. 395). In a subsequent case (*Jagabandhu Mitra* v. *Purnanand Gossami*, I. L. R. 16 Calc. 530), the principle laid down in *Jagabandhu Mukharji* v. *Ram Chandra Barsakh* was extended by another Full Bench of the Calcutta High Court to the case of an auction purchaser who had obtained only symbolical possession of the property purchased by him. It was held that this symbolical possession gave him a good cause of action against a person who had taken an *ijara* from the son of the judgment debtor in the original case. By this Full Bench decision a previous ruling to the contrary effect in *Krishna Lal Datta* v. *Radha Krishna Sarkhel* (I. L. R. 10 Calc. 402) was overruled.

Malicious prosecution

In a suit for damages for malicious prosecution, it lies on the plaintiff to prove the existence of malice and of want of reasonable and probable cause, before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds (*Nadhauri Chandra Sarmah* v. *Brahmomai Debi*, 3 W. R. 169: *Magniram Chaudhri* v. *Ganesh Datta Singh*, 5 W. R. 134: *Brajonath Rai* v. *Krishna Lal Rai*, 5 W. R. 282: *Mahendro Nath Datta* v. *Kailash Chandra Datta*, 6 W. R. 245: *Dungrasm Baid* v. *Girdhari Mal Dugar*, 10 W. R. 439: *Gaur Hari Das* v. *Hayagrib Das*, 6 B. L. R. 371 14 W. R. 425: *Roshan Sirkar* v. *Nobin Chandra Ghatak*, 6 B. L. R. 377 note: 12 W. R. 402: *Kaibatulla* v. *Moti Peshakar*, 13 W. R. 276: *Aghor Nath Rai* v. *Radhika Prasad Basu*, 14 W. R. 339: *Ram Badan Singh* v. *Sardar Dyal Singh*, 17 W. R. 101 *Ganesh Datta Singh* v. *Magniram Chaudhri*, 11 B. L. R. P. C. 321: 17 W. R 283 *Dunne* v. *Legge*, All. H. C. Rep. 1866, 38: *Kishori Lal* v. *Inayat Hossein Khan*, All. H. C. Rep., 1869, 11 *Weatherall* v. *Dillon*, All. H. C. Rep., 1874, 200 *Swami Nayuda* v. *Subramanya Mudali*, 2 Mad H. C. Rep. 158 *Vengama Naikar* v. *Raghavachari*, 2 Mad. H. C. Rep. 291: *Moonee Ummah* v. *The Municipal Commissioners of Madras*, 8 Mad. H. C. Rep. 151: *Hall* v. *Venkatakrishna*, I. L. R. 13 Mad. 394 and *Girdhar Lal Dyaldass* v. *Jagarnath Girdhar Bhai*, 10 Bom. H. C. Rep. 182. So, in a suit for damages for defamation of character, the plaintiff must start his case by showing that he was not guilty of the offence charged, before the defendant can be called upon to show that he made the imputation in good faith (*Mohendra Chandra Chakravartti* v. *Sarba Kokya Debya*, 11 W. R. 534).

Notices.

In a suit to set aside the sale of a *patni taluk*, on the ground that the notices required by sub-section 2, section 8, Regulation VIII of 1819 had not been duly published, it lies on the defendant to show that the sale was preceded by the notices required by that sub section, the service of which notices is an essential preliminary to the validity of the sale *Haro Doyal Rai Chaudhri* v. *Mahomed Ghazi Chaudhri*, I. L. R. 19 Calc. 699: see also *Durga Charan*

Sarma Chaudhri v. *Syad Nazamudin*, 21 W. R. 397. Where under an Act certain things require to be done before any liability attaches to a person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done: therefore, in a suit for arrears of road cess, it is for the plaintiff to prove the publication of the notices and extracts from the valuation roll of the estate prescribed by section 52 of Act IX (B. C.) of 1880, and no presumption can be made as to their due service: *Ahsanullah* v. *Trilochan Bagchi*, I. L. R. 13 Calc. 197. See also *Rash Bihari Mukharji* v. *Pitambari Chaudhurani*, I. L. R. 15 Calc. 237.

In cases of collision at sea the master and owners of the colliding vessel, even though compelled by law to take a pilot on board, are *primâ facie* liable for damage caused by their ship; and in seeking to exonerate themselves, the burden of proof is on them to show that the neglect which caused such damage was that of the *pilot* and solely his (*The ship "Glencoe,"* 1 Boul. Rep. 105: *Mahamed Yusuf* v. *The P. & O. Steam Navigation Co.*, 6 Bom. H. C. Rep. 98, O. C.) Where a person sued on a Policy of Insurance, which contained certain exceptions, in the event of which the assurers were not to be liable, it was held that it lay upon the plaintiff to prove that the loss did not fall within any of these exceptions (*Aga Syud Sadack* v. *Haji Jackariah Mahomed*, 2 Ind. Jur. N. S. 308). In the case of a contract to sow indigo, when it has not been sown according to the contract, not sowing is *primâ facie* evidence of dishonesty; and, if the benefit of clause 4, section 5 of Bengal Regulation XI of 1823 be claimed on the ground that failure to sow was owing to accident or to some cause not implying fraud or dishonesty, the burden of proof is on the person who claims such benefit (*Lal Mahomed Bunnas* v. *Watson & Co.*, 1 Ind. Jur. 3). Where a person purchased at an execution sale a *tora garas hak*, or the right to a certain annual payment made by Government, and sued to have his name entered as the *payee* thereof in the Collector's book, it was held that it lay upon Government to show that this right was inalienable (*Sambhu Lal Girdhar Lal* v. *The Collector of Surat*, 8 Moo. I. A. 1: 4 W. R. P. C. 55).

Miscellaneous cases.

A purchaser of a tenure, who seeks to exercise the statutory right of avoiding an incumbrance given him by section 12 of Act VII (B. C.) of 1868, must give some *primâ facie* evidence to show that the particular incumbrance which he seeks to avoid, comes within the purview of the section (*Kailas Bashini Dasi* v. *Gokul Mani Dasi*, I. L. R. 8 Calc. 230. *Govind Nath Saha Chaudhri* v. *Reily* I. L. R. 13 Calc. 1. but see *Rash Bihari Basu* v. *Hara Mani Debya*, I. L. R. 15 Calc. 755, and *ante*, p. 485).

A plaintiff suing to set aside the sale of a *patni talúk*, on the ground that the Collector acted without jurisdiction in making the sale, must prove this allegation (*Kali Kumar Mukharji* v. *The Maharaja of Burdwan*, 5 W. R. 39). When in a suit for pre-emption the plaintiff impugns the price stated in the conveyance, *prima facie* evidence will be sufficient to throw upon the vendor and vendee the burden of proving by cogent evidence that the price,

so stated is the true one (*Bhagwan Singh* v. *Mahabir Singh*, I. L. R. 5 All. 184: *Tawakkal Rai* v. *Lachman Rai*, I. L. R. 6 All. 344: *Sheopargash Dube* v. *Dhanraj Dube*, I. L. R. 9 All. 225). The burden of making out a *primâ facie* case in the first instance is on a person who sues for possession after being declared to be out of possession by an order made by a Collector under The Land Registration Act, VII (B.C.) of 1876 (*Madan Mohan Poddar* v. *Bhoggomanto Poddar*, I. L. R. 8 Calc. 923).

As to the effect of an order under section 55 of The Land Registration Act, VII (B.C.) of 1876, see *Omranissa* v. *Dilawar Ali Khan*, I. L. R. 10 Calc. 850, and *Saraswati Dasi* v. *Dhanpat Singh*, I. L. R. 9 Calc. 431: 12 C. L. R. 12; and as to the effect of an order under s. 59 of the same Act, see *Ram Mandar* v. *Janki Persad*, 12 C. L. R. 139.

As to the burden of proving his allegation being upon a person who alleges that *takbast* proceedings are wrong, see *Lilanand Singh* v. *Lachmanar Singh*, 10 C. L. R. 169: and as to the burden of proving the alleged invalidity of settlement proceedings, see *Nadiar Chand Singh* v. *Chandra Sikhar Sadhu*, I. L. R. 15 Calc. 765. In a suit for confirmation of a sale held in execution of a decree, the *onus* lies on the defendant to prove that there was material irregularity in publishing and conducting it: *Bandi Bibi* v. *Kalka*, I. L. R. 9 All. 602.

When it is objected that the plaintiff had a cause of action and omitted to sue in a former suit for that which he claims in a subsequent suit, the burden of proving this objection lies on the defendant who makes it (*Skinner & Co.* v. *Shama Sundari*, 19 W. R. 429). The burden of proving that the summons was not served lies upon a person claiming the benefit of section 119 (new section 108) of the Code of Civil Procedure (*Torab Ali* v. *Churaman Singh Chaudhri*, 24 W. R. 262).

When a defendant asserts that a suit is overvalued, the burden of proving the truth of this assertion is on him (*Uma Sankar Rai Chaudhri* v. *Mansur Ali*, 5 B. L. R. App. 6). In a suit for mesne profits it lies upon the wrong-doers to show what were the sums realized as rent during their possession: *Brajendro Kumar Rai* v. *Madhab Chandra Ghosh*, I. L. R. 8 Calc. 343. When a person came into Court under section 230 of the old Code of Civil Procedure, alleging that he had been dispossessed, in the execution of a decree, from land or other immoveable property which was *bonâ fide* in his possession on his own account or on account of some person other than the defendant, and that it was not included in the decree, or if included in the decree, that he was no party to the suit in which such decree was passed, it was held that it lay on him to prove his possession; that he might, if he wished, give evidence of title beyond possession, but it was not absolutely necessary for him to do so in the first instance (*Radha Piyari Debi Chaudhrain* v. *Nabin Chandra Chaudhri*, F. B. 5 B. L. R. A. C. 708: *Brindabun Chandra Rai* v. *Tara Chand Bandapadhyay*, 11 B. L. R. 237: *Yusan Khatun* v. *Ramnath Sen*, 7 B. L. R. App. 26: *Saroda Mayi Chaudhrain* v. *Nabin Chandra Chaudhri*, 11 W. R. 255: *Mahomed Ausar* v. *Prakash Chandra Saha*, 8 W. R. 8). The corresponding section (332) of the

present Code enacts that the Court shall confine itself to the grounds of dispute specified in the section.

When a party complains in appeal of the rejection of evidence by a lower Court, he must be able to show that the evidence was tendered and rejected (*Moti Lal Upadhya* v. *Jagarnath Gurg*, 1 Moo. I. A. 1: *Modi Kaikhusrow Harmasji* v. *Cuverbhai*, 6 Moo. I. A. 448). The burden of proof lies upon a defendant who pleads that the plaintiff is a minor and therefore unable to sue (*Cheit Narain Singh* v. *Banwari Singh*, 23 W. R. 395: *Nilmani Chaudhri* v. *Zahirunnissa Khanum*, 8 W. R. 371). Upon a petition under section 231 of The Succession Act for revocation of probate, on the ground that citation was not duly published, and that petitioner being a minor under the care of the person who obtained probate did not understand his fraud, it was held that the petitioner should be allowed an opportunity of proving these allegations; and if she succeeded, there should be a new trial as to the *factum* of the will, which the person propounding would have to prove in the ordinary way (*Dintarini Debi* v. *Daibo Chandra Rai*, I. L. R. 8 Calc. 889: 11 C. L. R. 190).

In a suit brought by *zur-i-peshgi* mortgagees for possession and to set aside a *mukarrari* lease, which the defendant alleged to have been granted to him by the mortgagor before the mortgage, it was held that, having regard also to the fact that the *mukarraridars* were in possession under a Magistrate's order, it lay on the plaintiffs in the first instance to give some evidence to impeach the validity of the *mukarrari* lease; but that, when they had made out a strong *primâ facie* case, the *onus* was shifted, and it was incumbent upon the *mukarraridars* to show by satisfactory evidence that the lease was really executed before the date of the mortgage, and that it was granted *bonâ fide* for a real consideration and was intended to be operative (*Shamnarain* v. *The Administrator-General of Bengal*, 23 W. R. 111). When the defendant impeaches the correctness of an Amin's report, the burden of proof is on him; and the plaintiff should not in the first instance be called upon to support its correctness (*Gauri Narain Mazumdar* v. *Madhu Sudan Dutt*, 2 W. R. Act X, 1).

As to the burden of proof in cases of bailment, see *Shields* v. *Wilkinson*, I. L. R. 9 All. 398. When a person is called upon under section 107 and 112 of the Code of Criminal Procedure to show cause why he should not be ordered to furnish security for keeping the peace, the *onus* of proof still lies upon the prosecution to establish circumstances which will justify the action of the Magistrate in calling upon persons to furnish security for keeping the peace: *Bihari Patak* v. *Mahomed Haiyat Khan*, 4 B. L. R. F. B. 46: *Queen-Empress* v. *Abdul Kadir*, I. L. R. 9 All. 452.

It is well settled that a will duly executed is not to be treated as revoked either wholly or partially by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the

earlier will, if it cannot be shown in what the difference consisted It is also well settled that the burden of proof lies upon the person who challenges the will that is in existence. These provisions have been established both in the Privy Council and the House of Lords (*Cutto* v. *Gilbert*, 9 Moo. P. C. 131: *Hitchins* v. *Basset*, 3 Mod. 203; Show Par. Cas. 146. *Goodright* v. *Harwood*, 2 W. Black, 937), and as they are founded on reason and good sense they must be regarded as of general application: *Sahib Mirza* v. *Umda Khanum*, I. L. R. 19 Calc. 444 L. R. 19 I. A. 83.

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

Illustration.

(*a*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

The cases given in the note to the preceding section will furnish further illustrations of the rule here laid down. As instances of a provision of law that the proof of a fact shall lie upon a particular person, reference may be made to section 44 of the Code of Criminal Procedure, which enacts that all persons shall give information of the commission of certain offences to the nearest Police officer or Magistrate, and throws upon such persons the burden of proving *reasonable excuse*, for not doing so—and to section 19 of The Indian Succession Act, under the provisions of which succession to the *moveable property* of a man, who dies leaving such property in British India, is regulated by the law of British India in the absence of proof of any domicile elsewhere; the person who seeks to have the succession regulated by any other law being, therefore, under the burden of proving another domicile.

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B. A must prove B's death

(*b*) A wishes to prove, by secondary evidence, the contents of lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the cases within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(*a*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

Section 235 of the old Code of Criminal Procedure (Act XXV of 1861) enacted that it should not be necessary to allege in the charge any circumstances for the purpose of showing that the charge did not come within any of the general exceptions contained in Chapter IV of the Indian Penal Code * and section 236 enacted that it should not be necessary at the trial, on the part of the prosecution, to prove the absence of such circumstances in the first instance; but that the accused person should be entitled to give evidence of the existence of any such circumstances, and that evidence in disproof thereof might then be given on the part of the prosecution. Section 237 then provided, that when the section referred to in the charge contained an exception *not being one of such general exceptions*, the charge should not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances. The Evidence Act expressly repealed (see Schedule) section 237 of Act XXV of 1861. The whole of the Act was subsequently repealed by the Code of Criminal Procedure, Act X of 1872, section 439 of

Alteration of the Law.

* See Paley on Conviction, 4th edn., p. 195.

which contained provisions as to the mode in which charges are to be drawn up Neither this section nor the corresponding section (221) of the present Code, Act X of 1882, expressly mentions exceptions, *general* or *special*; but it is clear from their provisions, and more especially from the *Illustrations* appended to these sections, that every charge is to be understood as assuming the absence of all circumstances constituting exceptions, general or special. The above section of The Evidence Act throws upon the accused the burden of proving the existence of circumstances which bring the case within any of the *special* as well as any of the *general* Exceptions of the Penal Code (*In re Shibo Prasad Pandah*, I. L. R. 4 Calc. 124 · 3 C. L. R. 122). So far, then, as the *special* Exceptions are concerned, an important alteration has been made in the law. With reference to "shall presume," see *ante*, page 89. But it is not necessary for the accused to plead the existence of such circumstances, and the burden of proving them may be established as well by the witnesses for the prosecution as well by the witnesses for the defence: *In re Kali Charan Mukharji*, 11 C. L. R. 232.

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b*) A is charged with travelling on a railway without a ticket The burden of proving that he had a ticket is on him.

In a suit brought against a zamindar to reverse the sale of a *patni* tenure on the ground of non-service of the notice required by clause 2, section 8, Reg. VIII of 1819, it was held, with reference to this section, that the burden of proving service of the notice lay on the defendant zamindar (*Durga Charan Sarma Chaudhri* v. *Syud Najanudin*, 21 W. R. 397: see also *Haro Dayal Rai Chaudhri* v. *Mahomed Ghazi Chaudhri*, I. L. R. 19 Calc. 699).

In the case of *Nabo Kissen Mukharji* v. *Promothonath Ghosh* (5 W. R. 148), the plaintiff, who was formerly *patnidar* of the village, sued for the possession of certain land which he claimed as *lakhiraj*, and from which he stated that he had been ousted by the defendant, who had become *patnidar* by purchase at a sale held under Bengal Regulation VIII of 1819. Although, according to the general rule, it would have lain upon the defendant to show that the land was *mâl* or rent-paying after 1790, yet it was held that as plaintiff, by reason of his having been formerly *patnidar* of the village, had special means of knowledge and was in a position to prove the area of the *mâl* lands, the burden of proof lay on him in the first place to show that the disputed land was not within this area. In *Ram Kumar Rai* v. *Bijai Gobind Baral* (7 W. R. 535), the dispute was between the zamindar and his tenant. The latter held lands of considerable extent under

the former, but objected that one of the two plots occupied by him had been held under a different title. It was decided that under such circumstances it was for the defendant to prove a matter which was peculiarly within his knowledge. From these cases was distinguished *Giridhar Hari* v. *Kali Kanth Rai Chaudhri* (3 B. L. R. A. C. 161), which resembled the latter of them, except in this that the defendant was not a tenant, but was sued as a trespasser and a wrong-doer. When the sons of a living father bring a suit against a creditor to get rid of a charge on the ancestral estate created by him, on the ground of his alleged misconduct in extravagant waste of the estate, the antecedents of their father's career being more likely to be in the knowledge of the sons, members of the same family, than of a stranger, the *onus* of disproving the charge may properly be placed upon them (see the remarks of their Lordships of the Privy Council in the case of *Hanuman Persad Panday* v. *Babu Mundraj Kunwari*, 6 Moo. I. A. 419; 18 W. R. 81, *note*). In a suit under The N.-W. P. Rent Act, XII of 1881, in which a co-sharer claims his share of the profits according to the rent-roll and the defendant lambardar pleads that the actual collections fell short of the rent-roll, the burden of proving negligence or misconduct on the part of the defendant lies on the plaintiff, and section 106 of The Evidence Act does not apply: *Mahammad Inayat Husain* v. *Muhamad Karamatullah*, I. L. R. 12 All. 301.

Alteration of documents.

The alteration of documents and the effect of such alteration may be considered in connection with the present subject. "When the instrument on its production," says Mr. Taylor, "appears to have been altered, it is a general rule that *the party offering it in evidence must explain this appearance*, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice; because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion. If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored[5] . . . . . It may be laid down as a general rule, that wherever it is an *offence* to alter a document after it has been completed, the law presumes, *primâ facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence. With respect, however, to a bill of exchange or a promissory note the law presumes nothing, but leaves the jury to decide *first*, by inspecting the instrument itself, whether any alteration has been made; and, *then*, on considering the extrinsic evidence offered, at what time and under what circumstances such alteration, if any, was made. These last questions cannot be solved by the jury on the mere inspection of the writing, for

[5] As to the mode of attesting alterations in wills, see section 58 of The Indian Succession Act, X of 1865. Where a Hindu, female, under a power given to her by the will of her husband, sold land to a third person, and after the sale forged attestations were added to the will, it was held, in a suit by the husband's heir to recover the property, that the title of such third person could not be affected by the forgery (*Paramma* v. *Ramchandra*, I. L. R. 7 Mad. 302)."

juries must decide not on conjecture but on proof. The rule of law applicable to this subject is, that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps also with this additional proviso that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it. . . . . The grounds of the doctrine are twofold. The *first* is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without any risk of losing by the event in case of detection. The *other* is to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned" (§§ 1616—1618; §§ 1819—1821, 8th edn.).

Case of material alteration.

The rule thus laid down has been followed in India. In *Petambar Manikji* v. *Motichand Manikji* (1 Moo. I. A. 420: 5 W. R. P. C. 53); Lord Wynford said:—"If a plaintiff produce a bond in this country or any other instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature. There is no such evidence here, and this is the whole of the case of the plaintiff below." In *Madan Mohan Kundu* v. *Safma Bewa* (Sutherland's Rulings on References from the Mufassil Small Cause Courts, p. 69), the defendant pleaded that the bond, on which the suit was brought, had been tampered with by the plaintiff, and so avoided. It was held that an erasure or alteration in a document in the possession of a plaintiff, and on which he relies in support of his case, must be fully and satisfactorily explained by him, and cannot be presumed to have taken place before the execution of the document. In *Kali Kumar Rai* v. *Ganga Narain Datta Rai* (10 W. R. 250), it was said that so long as an alteration was made without the consent of the parties, and with a fraudulent view of benefiting him who propounds the deed, such a deed is not any evidence to support the claim of the party who propounds it, and the materiality or otherwise of the alteration does not affect this broad rule of law. In *Gagan Chandra Ghosh* v. *Dharanidhar Mandal* (I. L. R. 7 Calc. 616: 9 C. L. R. 257), the obligee of a bond executed by one of three brothers forged the signatures of the other two brothers. It was held upon proof of the forgery that the bond was avoided. When the obligee of a bond got another attesting signature added to it by a man who had not witnessed the execution, it was held that the alteration was material, and he could not sue on the bond (*Sitaram Krishna* v. *Daji Devaji*, I. L. R. 7 Bom. 418). In a later case decided by the Calcutta High Court *Mohesh Chandra Chatarji* v. *Kamini Kumari Debi*, I. L. R. 12 Calc. 313, this decision was dissented from, and it was held that the interpolation of the name of a witness in a document which need not be attested is not a material alteration that would render the document void. In this case it was further pointed out that the alteration

Indian cases.

which vitiates an instrument must be a material alteration, *i.e.*, must be one which alters or attempts to alter the character of the instrument itself, which affects or may affect the contract which the instrument contains or is evidence of. But when the alteration is material, the instrument is void. *In Ganga Ram* v. *Chandan Singh* (I. L. R. 4 All. 62), the obligor was not permitted to recover the amount admittedly due upon a mortgage-bond which he had altered by inserting a share larger than the share of the property originally specified therein. A promissory note was held to be avoided by an alteration of the interest clause, which had the effect of altering the rate of interest (*Udeychand Bádáji* v. *Bhaskar Jagonath*, I. L. R. 6 Bom. 371).*

So in *Christacharlu* v. *Karibasayya*, I. L. R. 9 Mad. 399, in which the plaintiff sued to recover Rs. 815 principal and interest due according to the terms of a registered mortgage-bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration (1) by inserting a condition, making the whole sum payable upon default of payment of any instalment, and (2) by doubling the rate of interest. The defendant admitted that he had received a certain portion of the consideration for the bond for the plaintiff, but it was held by a Full Bench of the Court that the suit must be dismissed. In a subsequent case (*Govinda Sami* v. *Kuppusami*, I. L. R. 12 Mad. 239) in which the plaintiff sued on a bond the date of which had been altered while it was in his possession, fraud was not proved, but it was held that the plaintiff could not recover, as the bond had been altered in a material part. But a material alteration, even if made after execution does not vitiate a deed, if it is made with the consent of all the parties : *Isak Mahomed* v. *Bai Fatma*, I. L. R. 10 Bom. 487.

In the case of *Khub Kunwar* v. *Mudnarain Singh* (9 Moo. I. A. 1 : 1 W. R. P. C. 36), it was laid down as follows :—"It may be conceded that in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, *independently of the instrument*, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence ; and such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document." The rule applies only when the party producing the instrument is seeking to enforce it or claiming an interest under it. The instrument "may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact," said Lord Abinger in a case in which an altered lease was admitted to show the terms of the holding, the relation of landlord and tenant being admitted on the record (Taylor, § 1621-1622;

* See section 87, Act XXV of 1881.

§ 1824-1825, 8th edn.). The case of *Davidson* v. *Cooper*[7] established in England the doctrine that every material alteration of an instrument, while in the custody of the party seeking to give it effect, *even by a stranger and without the privity of either party, vitiates that instrument when relied on as the foundation of a right sought to be enforced*, and this even though the alteration was the effect of pure accident or mistake. Mr. Taylor very reasonably contends against the hardship and injustice of this doctrine, and points out that it has not been recognized by the Irish Court of Exchequer; nor in America, where the New York Civil Code allows the party producing a writing altered in a material part to show that the alteration was made by *another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. He maintains that the sound rule of law cannot be carried further than this, that any party seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made either before its execution or at a time when the instrument was not in his possession, or under his control. This view of the law would seem to have been adopted by the Madras High Court in *Paramma* v. *Rama Chandra*, I. L. R. 7 Mad. 302.

Case of immaterial alteration.

If the alteration be an *immaterial* one, it will, if made *fraudulently* by the party claiming under the instrument, avoid it so far as he is concerned. If, however, it have been done innocently and to no injurious purpose, it will not have this effect. In the case of *Aldous* v. *Cornwell*,[8] the words "on demand" had been added to a promissory note by the plaintiff, or while the note was in his hands. It was held that this alteration did not avoid it, as the words were immaterial and merely expressed what the law would have supplied. The same principle was followed by the Bombay High Court in *Tikamdás Javáhirdás* v. *Gangákom Mathurádás*, 11 Bom. H. C. Rep. 203. And in *Ede* v. *Kanto Nath Sha* (I. L. R. 3 Calc. 220) in which to a contract between the plaintiff and the defendant for the purchase by the defendant of a cargo of salt, the plaintiff after the contract had been signed by the defendant added in the margin: "Ten days' demurrage will be allowed at Rs. 250 *per diem*," it was held that as this alteration did not appear to be attested by the signature, and did not alter the character of the document, it did not amount to an alteration within the rule of English law.

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

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[7] 11 Meeson & Welsby's Reports, 778, 799, 802; and 13 *ib.*, 343.
[8] L. R. 3 Q. B. 573.

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Burden of proving that person is alive who has not been heard of for seven years.

108. [Provided that when[9]] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to[1]] the person who affirms it.

According to Hindú law, *twelve* years must have elapsed before an absent person of whom nothing has been heard during this period, can be presumed to be dead; and no right can accrue to any person as heir of such an absent person until the expiry of *twelve* years from the date on which he was last heard of (*Janmajai Mazumdar* v. *Keshab Lal Ghosh*, 2 B. L. R. A. C. 134; *Guru Das Nag* v. *Matilal Nag*, 6 B. L. R. App. 16). According to Muhammadan law, *ninety* years from his birth must have elapsed before the death of a missing person can be presumed (Hedaya, Book xiii; *Bakhi Bibi* v. *Rahat Bibi*, 7 N.-W. P. Rep. 191). The effect of the above two sections is to establish one uniform rule for all cases.

This has been settled in the case of Muhammadans by the Full Bench case of *Mazhar Ali* v. *Budh Singh* (I. L. R. 7 All. 297) in which it was laid down that the rule contained in section 108 of The Evidence Act governs the case of a Muhammadan who has been missing for more than seven years when the question of his death arises in cases to which under the provisions of The Bengal Civil Courts Act the Muhammadan law is applicable. In this case it was pointed out by *Mahmud, J.*, that the rule of Muhammadan law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan law itself, a rule of evidence and not of succession, inheritance, marriage or caste, or any religious usage or institution. The same rule was laid down as regards Hindús in *Dharup Nath* v. *Gobind Saran*, I.L.R. 8 All. 614. In this case the subject of dispute was the separate estate of a sonless Hindú, on whose death it had devolved on his two widows. On the death of the survivor of the widow, a daughter's son of the deceased Hindú was alive, and another daughter's son was missing, not having been heard of for about 15 years. It was held that the question whether the missing daughter's son was living at the time of the second widow's death was a question of evidence governed by sections 107 and 108 of The Evidence Act, and that under the circumstances he must be held to have died prior to the time referred to. The same view was adopted by the Bombay High Court in *Dhondo Bhikaji* v. *Ganesh Bhikaji*, I. L. R. 11 Bom. 433; and by the Madras High Court in *Balayya* v. *Kistnappa*, I. L. R. 11 Mad. 443. In *Dharup Nath* v. *Govind Saran*, I. L. R. 8 All. 614, it was further ruled by

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[9] The words in brackets were substituted for "when" by section 9 of the amending Act, XVIII of 1872.

[1] The words in brackets were substituted for "on" by section 9 of the amending Act, XVIII of 1872.

Mahmud, J., that sections 107 and 108 of The Evidence Act do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises it must be dealt with according to the evidence and the circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. This is in accordance with the rule of English law under which, though *death* is to be presumed, there is no presumption as to the time of death, and therefore if any one has to establish the precise period during those seven years at which the person died, he must do so by evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life—Taylor, § 157; § 200, 8th edn.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Partnership

As to Partnership, see Chapter XI, sections 239—266 of The Indian Contract Act, IX of 1872. Section 264 enacts that persons dealing with a firm shall not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. The party alleging that notice was given will, as a general rule, have to prove this allegation.

Agency.

As to the relation of Principal and Agent, see Chapter X, sections 182—238 of the same Act. Section 206 enacts that reasonable notice must be given of revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. Section 208 enacts that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him; or, so far as regards third persons, before it becomes known to them.

Landlord and Tenant.

Where two persons set up rival claims to the tenancy of the same piece of land under the same landlord, and one of them admitted the previous tenancy of the other, who, he pleaded, had relinquished the land, which was upon this leased to himself, it was held that it lay upon him to prove the relinquishment which he thus alleged (*Kissen Chandra Saha* v. *Hukum Chand Saha*, W.R. 1864, 47). When the relation of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relation has ceased to exist. The tenant is bound to show by some affirmative proof that it has ceased to exist, especially when he does not deny

that he still continues to hold the land.—*Rango Lal Mandal* v. *Abdul Ghaffur*, I. L. R. 4 Calc. 314. See also *Parbati Dasi* v. *Ram Chand Bhattacharji*, 3 C. L. R. 576.

In the case of *Abhai Charan Sirkar* v. *Hari Nath Rai*, I. L. R. 8 Calc. 72; 10 C. L. R., 81, there were two joint owners of a *mauzah*. One of them leased his share to a *patnidar*; and by an arrangement made between the other co-sharer and the *patnidar* a private partition of the lands was made, and each party collected the rents of the lands allotted to him. Forty years afterwards a partition of the *mauzah* was made by the Collector between the two joint owners, to which the *patnidar* was no party, and by this partition lands held by the *patnidar* were allotted to his lessor's co-sharer. On this co-sharer's suing for possession of the lands so allotted to him, and alleging that the previous private partition was merely a temporary one, it was held that the onus lay on him to prove that this was the case, and that it had legally come to an end, the presumption being that a state of things proved to exist or admitted, continues until the contrary is proved.

It may be observed that the above provisions of The Evidence Act are founded on a general presumption arising from the experienced *continuance*, for a longer or shorter period, of human affairs.

Burden of proof as to ownership.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Men generally own the property which they possess, and *possession* is therefore presumptive proof of *ownership*. The rule applies to property real and personal, moveable and immoveable. A plaintiff, seeking to eject a person from immoveable property and to obtain possession thereof for himself, must in consequence recover by the strength of his own legal title, and cannot in the first instance call upon the defendant to show the title under which he holds. In the case of *Jawala Baksh* v. *Dharam Singh* (10 Moo. I. A. 528), their Lordships of the Privy Council said :—"The appellant was in possession of the estate. He and his father had held continual possession of it from December 1843, if not from October 1842. His own possession of it had been unquestioned since February 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate.—*i.e.* a title which would give the claimant a right to the estate, failing the title impeached. The judgment of the Sadr Court assumes that the title set up by the plaintiffs may be wholly bad. . . . . The effect, therefore, of the judgment is to defeat the appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned

Possession.

out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession. . . . . It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the Sadr Court ought to have decided, and which must now be decided on this appeal, is whether the plaintiffs have shown any title to this property In the case of *Ram Ratlan Rai* v. *Faruksunnissa Begam and Rukya Begam* (4 Moo. I. A. 233), the defendant was in possession of certain land under a deed of sale from the person last seised, and was forcibly ousted by the plaintiffs, who claimed under a deed of gift from the same person. The defendant was by an order of the Criminal Court restored to possession, the plaintiffs being directed to bring a civil suit to establish the title set up by them. They did so, and it was held in this suit that it was incumbent on them to prove their right to the land claimed by them before they could put the defendant to proof of his title. So, in *Baradakanth Rai* v. *Chandra Kumar Rai*, (12 Moo. I A 145: 2 B. L. R. P. C. 1) one of the claimants in a case of disputed boundaries was in possession by virtue of a Magistrate's order made under Act IV of 1840,[2] and it was held that it lay on the party seeking to oust him to show a better title to the land claimed than that of the party in possession. See, to the same effect, *Kali Naratin Basu* v. *Anand Mayi Gupto*, 21 W. R. 79. When a person, who by an order under The Land Registration Act, VII (B. C.) of 1876, has been declared to be out of possession, brings a suit to recover possession, the burden of proving a *primâ facie* case in the first instance is on him (*Madan Mohan Poddar* v. *Bhogomanto Poddar*, I. L R 8 Cal. 923, but see *Omranissa Bibi* v. *Dilawar Ali Khan*, I. L. R. 10 Calc. 350)[3]. In *Sevvaji Vigaya Raghanadha Valoji Kristnan Gopaar* v. *Chinna Nayana Chetti* (10 Moo. I. A. 151), the plaintiff sued to recover a village in the possession of the defendant, whose title and that of his predecessor's had been unchallenged for forty-four years. His allegation was that his ancestor had merely mortgaged the land to the ancestor of the defendant, and that the defendant was only an usufructuary mortgagee in possession. It was held that the *onus probandi*, or burden of proof, was on the plaintiff, who could only succeed by the strength of his own title, and not by reason of the weakness of the defendant's title. "A plaintiff," it was said, "who alleges that his ancestor, forty four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title and not by reason of the weakness of the opponent's. It would be contrary to all principles of law and justice, that upon such an allegation a plaintiff

[2] This Act was repealed by Act XVII of 1862. The analogous provisions of existing law will be found in sections 145—148, Chapter XII of the Code of Criminal Procedure, Act X of 1882.

[3] As to whether registration under the Act is any evidence of title, see *Ram Bhusan Mahto* v. *Jebli Mahto*, I. L. R. 8 Calc. 853; and *Saraswati Dasi* v. *Dhanpat Singh*, I. L. R. 9 Calc. 431 12 C L R. 12.

should be able to require the present possessor to prove his title, and if he failed in doing so, to dispossess him of the land in question." The burden of proof was also laid on the plaintiff in the similar case of *Ratan Kuar* v. *Jiwan Singh* (I. L. R. 1 All. 194), where the defendants, admitting the former proprietary right of plaintiff's ancestor, set up a purchase from him some thirty years previously. See also *Ram Chandra Apaji* v. *Balaji Bhaurav*, I. L. R. 9 Bom. 137. Where a plaintiff sued to recover possession of certain lands, alleging that they had been granted by his ancestor to P R to be held in *jagir* tenure by P R and his lineal descendants, that P R's lineal descendants had failed, and therefore plaintiff was entitled to resume possession, it was held by the Privy Council that it lay upon the plaintiff to prove the grant to P R in the first instance; and that, until he had done this, he had no standing in Court (*Jagarnath Sahi* v. *Ahlad Kowar*, 19 W. R. 140). In the case of *Ranjit Ram Panday* v. *Gobardhan Ram Panday* (20 W. R. 25), there was strong evidence of possession on one side, opposed by evidence apparently strong on the other side; and the presumption that possession goes with the title was held to make more probable the case of that side on which this presumption arose. See also *Mahima Chandra De Sirkar* v. *Haro Lal Sirkar*, I. L. R. 3 Calc. 768: 2 C. L. R. 364: *Dharm Singh* v. *Har Prasad Singh*, I. L. R. 12 Calc. 38. A *zamindar* has as such a *primâ facie* title to the gross collections of all the *mauzahs* or villages within his *zamindari*, and the burden of proof is upon a person who seeks to defeat that right by proving that he is entitled to an intermediate tenure (*Prahlad Sen* v. *Durga Persad Tewari*, 12 Moo. I. A. 331: 2 B. L. R. P. C. 134). The same principle applies when the *zamindar* or an assignee or lessee of his rights demands possession of the land from a person who is unable to prove a tenancy or other right of continuing to occupy (*Ram Mani Mohurrir* v. *Alimudin*, 20 W. R. 374: *Rajkissen Mukharji* v. *Piyari Mohan Mukharji*, 20 W. R. 421: *Batai Ahir* v. *Bhagobati Koer*, 11 C. L. R. 476).

The following cases may also be referred to:—*Mohesh Narain Singh* v. *Krishnanand Misser*, 9 Moo. I. A. 324: 5 W. R. P. C. 7. ("It would be monstrous to make the title to land in a purchaser depend, years after it has accrued and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time"): *Tiery* v. *Kristodhan Basu*, L. R. 1 I. A. 83 (Expediency of insisting on strict proof on part of plaintiff in ejectment): *Forbes* v. *Mir Mahomed Hosen*, 12 B. L. R. 215 (Here the Privy Council said: "It is, however, to be observed that the course of modern legislation and also of modern decision has, if not in the case of *lakhiraj* lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases by giving force to the contrary presumptions arising from proof of long and undisturbed possession"): *Surnamayi* v. *Watson & Co.*, 20 W. R. 211 (The Privy Council said:—"The suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title and not upon the weakness of that of her adversary. It is immaterial, therefore, to consider whether the land

is the property of the defendants or not, because, whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out"). *Sham Narain* v. *The Court of Wards*, 20 W. R. 197. *Rahamulla* v. *Mahomed Akbar*, 8 Mad. H. C. Rep. 63. *Ashraf unissa Begam* v. *Raghunath Sahai*, 2 W. R. 267 (Suit by the alleged assignee of a mortgagor under a *zar-i-peshgi* lease to recover possession of the land from the alleged mortgagee on payment of the alleged balance due): *Chandra Mani Chaudhrain* v. *Raj Kissor Saha*, 5 W. R. 246 (Suit to recover land which the plaintiff alleged that he had purchased at a sale in execution of a decree). *Pulin Bihari Sen* v. *Watson & Co.*, 9 W. R. 190 (The party who avers a title must make out such title, even if it be necessary to prove a negative in order to do so) *Harasundari Debya* v. *Amina Begam*, 1 Jur. N. S. 188 *Srimati Debya* v. *Madan Mohan Singh*, 2 B. L. R. A. C. 326 (Suit to recover possession of land seized in execution, sold after rejection of a claim by plaintiff, and purchased by judgment-creditor, who sold to the defendant, who ousted plaintiff). Where the plaintiff in a suit for declaration of title made out a *prima facie* title to the property by producing the title-deeds in favour of himself, it was held that it lay upon the defendant to disprove this title (*Svarnamayi Raur* v. *Srinibash Kayal* 6 B. L. R. 1 5).

The rule has, however, no application when the possession has been obtained by force or fraud. A man cannot be allowed to take advantage of his own wrong in order to shift the burden of proof to his opponent. Where, therefore, the plaintiff proves that he was in possession and was ousted by the defendant otherwise than by due course of law, the burden of proving a title in the first instance is shifted upon the defendant (*Jadabnath* v. *Ram Sundar Sarmah*, 7 W. R. 174 *Radha Ballab Gosain* v. *Kissen Gobind Gosain*, 9 W. R. 71: *Gaur Poroy* v. *Unasundari Debya*, 12 W. R. 472: *Mahesh Chandra Bandopadhya* v. *Baroda Debi*, 2 B. L. R. A. C. 274. *Mahomed Baksh* v. *Abdul Karim*, 20 W R. 458. *Daitari Mahanti* v. *Jagabandhu Mahanti*, 23 W R. 293: *Mahabir Persad Singh* v. *Mahabir Singh*, 1. L. R. 7 Calc. 591 · 9 C. L. R. 164: *Braja Sunder Gosami* v. *Kailas Chandra Kar*, 11 C. L. R. 133). In *Pemra Bhavaniram* v. *Narayan Shivaram Khisti* (I. L. R. 6 Bom. 215), property in possession of A had been attached and sold in execution of a decree against B. A brought a suit against the purchaser to establish his title. It was held that, having proved his possession at the date of the execution sale, he was entitled to a decree declaring his right to the property against the defendant, upon whom it lay, and who had failed, to prove a better title in himself or the judgment debtor, B.

Under the provisions of section 9 of The Specific Relief Act, I of 1877, which takes the place of the repealed section 15, Act XIV of 1859, if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he, or any person claiming through him, may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit. But nothing in this section shall be

Possessory suit under section 9 of The Specific Relief Act, 1877.

any person from suing to establish his title to such property and to recover possession thereof. No appeal lies from an order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed. The object of these provisions is to discourage parties from taking the law in their own hands, and from asserting their rights by force. The result of a suit under the section is to restore to possession the party ousted by force, and to leave the question of title wholly untouched and open to litigation in a regular suit. It has, therefore, been held that when a regular suit to establish title and recover the land is brought against the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit; and, until he can show a title to the property, the Court will not look into the defendant's title or disturb his possession[4] (*Mannadin* v. *Grish Chandra Rai Chaudri*, 7 W. R. 230). If he prove twelve years undisturbed possession antecedent to the ejectment under the summary order made under the above section, this will be good title, sufficient at least to throw upon the defendant the burden of proving a better one (*Ram Chandra Chaudhri* v. *Brajanath Sarma*, 3 B. L. R. App. 109: *Ballabi Kant Bhattacharjya* v. *Durjodhan Sikdar*, 7 W. R. 89).

Whether possession is prima facie evidence of title.

When a person ousted otherwise than by due course of law fails to avail himself within six months of the summary remedy provided by this Act, and afterwards brings a regular suit to recover possession, it has been questioned whether the burden of proof ought to be laid upon him or upon the defendant. Section 9 of Act I of 1877 provides a special and a summary remedy, and it has been argued that it was not intended to interfere with the rule that a man cannot be permitted to take advantage of his own wrongful act to shift the burden of proof upon his opponent. On this point the rulings of the Calcutta, Madras, and Bombay High Courts do not agree. Most of the earlier cases of the Calcutta High Court are in favour of the plaintiff's right to succeed in such a suit upon mere proof of previous peaceable possession and of dispossession[5]—*Inayatullah Chaudhri* v. *Krishna Sundar Sarmah*, 8 W. R. 386. *Dalji Sahu* v. *Tannizudin*, 10 W. R. 102. *Ayesha* v. *Kanhai Mullah*, 12 W. R. 146. *Shoma Sundari Debi* v. *The Collector of Maldah*, 12 W. R. 164. *Trilochan Ghosh* v. *Kailashnath Bhattacharji*, 12 W. R. 175. *Nagoi Mani Debi* v. *Smith*, 23 W. R. 291. Other cases to the same effect are cited on the preceding page.

[4] If in such regular suit the defendant plead limitation, the plaintiff can not by way of answer set up the possession which, having obtained otherwise than in due course of law, he held before the possessory suit (*Ghulam Nabi* v. *Bissonath Kar*, 12 W. R. 9: *Premchand Kolbarto* v. *Hari Das Kolbarto*, 2 W. R. 239. *Tara Banu* v. *Abdul Ghafur*, 12 C. L. R. 486).

[5] See *contra*, *Amir Bibi* v. *Takrunissa Begam*, 7 W. R. 332, and on review, 8 W. R. 370, and *Ram Dutt Chaudhri* v. *Lakhi Koer*, 11 W. R. 447. *Nand Kishor Lal* v. *Sheo Dayal Upadhya*, 11 W. R. 168. *Ram Mohan Das* v. *Jhapru Das*, 14 W. R. 41. *Crowdy* v. *Ram Bharosi Chaudhri*, 23 W. R. 383. It is scarcely necessary to observe that possession can be proved by oral evidence (*Maniram Deb* v. *Debi Charan Deb*, 4 B. L. R. F. B. 97. *Doe* v. *Dyeball*, Moo. & M. 346: *Asher* v. *Whitelock*, 11 Jur. N. S. 925: *Davison* v. *Gent*, 3 Jur. N. S. 342).

In the case of *Kawa Manjhi* v. *Khawaj Nasiryo*, 5 C. L. R. 278, however, the Bench (*Morris and Prinsep, J.J.*), disagreed. The opinion of *Morris, J.*, which as that of the senior Judge prevailed, was that, as the plaintiff had proved that he had been in possession of the land in suit, and had been ousted by the defendants, he was entitled to succeed, as possession is *primâ facie* evidence of title, and cannot be disturbed unless the party so disturbing it can show a better title. *Prinsep, J.*, however dissented, and held that proof of prior possession and of illegal dispossession is not sufficient evidence of title except in a possessory suit under The Specific Relief Act. He further expressed an opinion, that the presumption of a good title which section 110 of The Evidence Act gives to one who is in possession of land is only to be made in favor of actual and present possession, the section not declaring generally that possession shall always be *primâ facie* evidence of title. Subsequently, in two other cases, *viz*, *Mahabir Prasad Singh* v. *Mahabir Singh*, I. L. R. 7 Cal. 591 : 9 C. L. R. 164 : and *Brajo Sundar Gosami* v. *Koilash Chandra Kar*, 11 C. L. R. 133, it was held that proof of quiet possession at the time of disturbance is sufficient to establish a *primâ facie* case against a trespasser. After this, the views of the Calcutta High Court changed, and in *Debi Charan Boido* v. *Ishar Chandra Manjhi*, I. L. R. 9 Calc. 39 : 11 C. L. R. 342, and *Ertaza Hossain* v. *Beni Misiri*, I. L. R. 9 Calc. 130 : 11 C. L. R. 393, it was held that mere recent possession would not entitle a plaintiff to obtain a decree for recovery of possession except under The Specific Relief Act, which entitles him to recover possession if the suit is brought within six months from the date of dispossession. These decisions were founded on a passage in the judgment of their Lordships of the Privy Council in *Wise* v. *Amirunissa Khatun*, L. R. 7 I. A. 73, in which it was said :—"If the plaintiffs had wished to contend that the defendants had been wrongfully put in possession and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under section 15 of Act XIV of 1859; but they did not do so. The High Court with reference to this point say (and, in their Lordship's opinion, correctly say) : 'lands to which the plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under section 15 of Act XIV of 1859, which must be brought within six months from the date of dispossession.'" This later view has been adhered to in the recent case of *Parmeshar Chaudhri* v. *Brajo Lal Chaudhri*, I. L. R. 17 Calc. 256.

The views of the Madras High Court on this question appear to be in accord with the recent rulings of the Calcutta High Court ; *Rassonada* v. *Sitharama*, 2 Mad. H. C. Rep. 171, and *Tirumalasami* v. *Ramasami*, 6 Mad. H. C. Rep. 420, but there have been no cases on this point recently decided by the Madras High Court.

The course of opinion in Bombay has been the opposite to that in Calcutta. The Bombay High Court at first held views similar to those

now held by the Calcutta High Court, In *Dadabhai Narsidas* v. *Sub-Collector of Broach*, 7 Bom. H. C. Rep. 82, it was said that "the law of India requires that in an action for ejectment we should always enforce the ordinary rule that a plaintiff should always recover by the strength of his own legal title. My reason for this is that the law of this country gives to a person who is dispossessed of property a remedy which the law of England does not provide; and that if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him." This was followed in *Lakshmibhai* v. *Vithal Ram Chandra*, 9 Bom. H. C. R. 53. Subsequently, however, in a Full Bench judgment delivered by *Westropp, C. J.*, in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*, I. L. R. 6 Bom. 215, it was laid down that possession is a good title against all persons but the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. This was followed in *Krishnarav Yashvahi* v. *Vasudeb Apaji Ghotikar*, I. L. R. 8 Bom. 371, in which *Dadabhai Narsidas* v. *The Sub-Collector of Broach* was dissented from, and it was said that the passage in the Privy Council judgment in *Wise* v. *Amirunnissa Khatun* had not the effect attributed to it by the Calcutta High Court.

The question was also raised, though not expressly decided, in a recent case, *Lachho* v. *Har Sahai*, I. L. R. 12 All. 46, in the Allahabad High Court. In this case, which was a suit for the possession of immoveable property, the plaintiff proved that he and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged but failed to prove that the plaintiff had paid him rent as a tenant at will. *Mahmud, J.*, before whom the case came, remarked that this would go far to prove that the plaintiff's possession was adverse. He also observed:—"It seems to me that it is usually for the plaintiff who seeks ejectment to prove his title. But I also hold that when possession for thirty or forty years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law, that the plaintiff's long possession indicates his ownership of the property." As the lower Court had erroneously regarded the plaintiff as only a licensee of the defendant's, the case was accordingly remanded for disposal on the merits. The views of Mr. Justice Mahmud in this case would seem to be in favour of the view taken by the Calcutta High Court of this question, for long possession would certainly be regarded by the Calcutta High Court as good evidence of title.

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is, that he who bargains in a matter of advantage with a person who places a confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void *ipso facto*, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy, and equity is cast upon the person in whom the confidence has been reposed.[6] The rule applies equally to all persons standing in confidential relations with each other. In addition to the instances of the application of the rule supplied by the *Illustrations*, the following also may be mentioned.—where a guardian or other person standing in the place of a parent purchases or takes a gift of property from his ward before or immediately after the latter has come of age: where a minister of religion, medical attendant, or other person has, through the means of a position presenting peculiar opportunities, acquired special confidence. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The section requires that the party on whom the burden of proof is laid should have been *in a position of active confidence*. There is a distinction between a confidential adviser who is generally *consulted* in the management of an individual's affairs, but who takes no part in such management, and an agent, steward, or other person who undertakes an office or engages actively in the concerns of such individual and in the general management thereof. It will be important to draw a distinction between the class of cases with which this section is concerned and another class of cases already referred to (*ante*, pp. 470—479). Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger, that is to say, a person not standing in any confidential or fiduciary relation towards the donor, equity will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence, and spontaneously executed or made by the donor with his eyes open. And it is equally clear, that in all cases where it has been proved that a mere stranger, connected with the donor by no peculiar or fiduciary relation from which undue

Principle administered in Courts of Equity.

[6] See Story's Equity Jurisprudence, §§ 309—327: and *Huguenin* v. *Baseley*, 2 Leading Cases in Equity, 504.

influence can be inferred, has, either by fraud, surprise, or undue influence, obtained from him a voluntary donation, a Court of Equity will at once set it aside; in such cases, however, *the proof of fraud, surprise, or undue influence is completely upon the donor* or person deriving title from him, for *primâ facie* the donation is valid.[7] Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person *gains a great advantage over* another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction is fair and honest; for, although the Courts never prevent one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influence or misrepresentation.[8] The Evidence Act does not provide specially for this last case, though it may possibly fall within the purview of section 114, *post*.

In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases: they are not, however, so important when no such confidential relation exists.[9]

The above principles have been acknowledged and acted upon in more than one Indian case. In *Bazlûr Rahîm* v. *Shamsûnissa Begam* (11 Moo. I. A, 551) a Muhammedan wife had brought a suit against her husband to recover the value of real and personal estate including certain Company's paper, which it was alleged was her separate property, and had been, as she lived in seclusion, endorsed and handed over by her to her husband for the purpose of obtaining the interest thereon. The defence was that the husband had purchased this paper from her, and had, on endorsement and delivery, paid her full value for the same. It was held that the husband was bound to show something more than the mere endorsement and delivery of the paper, and that, from the relations subsisting between the parties, the burden of proof was upon him to establish—*first*, that the transaction which he set up was a *bonâ fide* sale; and, *secondly*, that he had given full value for the paper. "That all these securities came to her hands whilst she was an inmate of his *zenanah*," said their Lordships: "that they all passed from her to him; that some of them remain in his possession, and that others have been traced to his creditors—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the

Indian cases.

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[7] 2 Leading Cases in Equity, 529—530.
[8] 2 Leading Cases in Equity, 543.
[9] 2 Leading Cases in Equity, 543: and see *Chedambara Chetty* v. *Renja Krishna Muthu Vira Puchanja Naiker*, 13 B. L. R. 528.

former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Her case is, that the securities were entrusted to him for a particular purpose, *viz.*, that of receiving the interest on them for her, and that, though they may have been endorsed, she never meant to transfer the property in them. His case is that he purchased them from her on several occasions, and that on their endorsement and delivery he paid her the value for them. The principle of the judgments of the Courts below seems to be, that although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is *a sound principle, and in accordance with the long-established practice of the Courts in India.* The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Muhammedan and a Hindu woman; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition: but the Hindu law is equally indulgent in that respect to the Hindu wife. It may also be granted that in other respects the Muhammedan law is more favourable than the Hindu law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussalman woman of rank, like the Hindú, is shut up in the zenanah, and has no communication, except from behind the *pardah* or screen, with any male person, save a few privileged relatives or dependants. The culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah nashin*, and that the burden of proving the reality and *bonâ fides* of the purchases pleaded by her husband was properly thrown on him." The case of *Abdul Ali*, alias *Shoagia* v. *Karimanissa* (9 W. R. 153), was also a suit by a Muhammedan female against her husband, from whom she had been divorced, to recover property, into possession of which the defendant had come by reason of his marriage with the plaintiff, and which he was found not to hold in his own right. The burden of proof was here also laid upon

the husband. In the case of *Rôp Narain Singh* v. *Gangadhar Persad Narain*, (9 W. R. 297), a Hindu *pardah-nashin* woman, acting as guardian of her minor sons, had sold three estates to the persons who held them under *zur-i-peshgi* mortgages, and who therefore were liable to account to the minors on behalf of whom their mother was acting. The minors, on coming of age, brought an action to impeach the sales, and it was held to lie upon the purchasers to prove the honesty of the transaction, partly because they had purchased from a *pardah-nashin* female, and partly because the purchase was that of the property of a person under a disability (see *ante*, pp, 470—479). A suit was brought against a Muhammedan lady for malversation in wasting and misappropriating property alleged to have been dedicated by her to religious uses by an instrument written in Persian, a language which she did not understand, and the effect of which was to devote all her property to such uses, to destroy her rights as proprietor, and to constitute her one only of the *mutawalis* for the management of the endowment, giving her three-twenty-eighth parts of the income only for her management. The Privy Council, agreeing with the High Court, held it not established that she understood the full import and effect of the document which she executed. "It is incumbent on the Court," said their Lordships, "when dealing with the disposition of her property by a *pardah-nashin* woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so in a case like the present where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property" (*Ashgar Ali* v. *Delrôs Banû Begum*, I. L. R. 3 Calc. 324: S.C. before the High Court in India, 15 B. L. R. 167: 23 W. R. 453). In the case of *Sudisht Lal* v. *Sheobarat Koer* (L. R. 8 I. A. 39: I. L. R. 7 Calc. 245), the Lords of the Privy Council said:—"In the case of deeds and powers executed by *pardah-nashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who execute them."[1] In the case of *Pushong* v. *Mûnia Hatwani* (1 B. L. R. A. C. 95), the transaction was between persons standing in the relation of legal adviser and client, and related to the subject of litigation or advice. Such a contract, it was observed, is liable to be questioned by the other side at any time, and when it is questioned, every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair,

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[1] As to the necessity of strict proof where *pardah-nashin* women are concerned, see also *Azizûnnissa* v. *Baqur Khan*, 10 B. L. R. 205: *Asmatunissa* v. *Alla Hafiz*, 8 W. R. Cr. 468: *Rukhan* v. *Ahmed Hosein*, 22 W. R. 443: *Fazal Hossein* v. *Amzad Ali Khan*, 17 W. R. 523: *Dulichand* v. *Umda Khanum*, 18 W. R. 238: *Girish Chandra Lahori* v. *Bhagobati Debya*, 13 Moo. I. A. 419: 14 W. R. P. C. 7: *Tamarasherri Sivithri Andarjanom* v. *Maranat Vasudevan Nambudripâd*, I. L. R. 3 Mad. 215 (Here the burden of proof was held to have been discharged); *Bihari Lal* v. *Habiba Bibi*, I. L. R. 8 All. 267.

adequate and reasonable. Failing that, his claims and rights under the contract, must fail. See also *Thakurdin Tewari* v. *Ali Hosein Khan*, I. R. 1 I. A. 192; 13 B. L. R. 427; 21 W. R. 340; *Pannalal Sil* v. *Rama Sundari Dasi*, 6 B. L. R. 732; and *Grose* v. *Amirtamayi Dasi*, 4 B. L. R. O. J. 1. In the case of *Ram Persad Misser* v. *Phulpali* (7 W. R. 99), the same principle was applied to a deed-of-gift of property, made by a Hindu *pardah-nashin* woman to a *mukhtar* employed by her to conduct certain suits. Other cases illustrating the application of this section are *Sital Prasad* v. *Prabhu Lal*, I. L. R. 10 All. 535; *Mannu Singh* v. *Umadat Panda*, I. L. R. 12 All. 523; *Wajid Khan* v. *Ewaz Ali Khan*, I. L. R. 18 Calc. 545; I. R. 18 I. A. 144.

Birth during marriage conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The legal maxim is, *Pater est quem nuptiæ demonstrant*—"He is the father whom the nuptials indicate." See the maxim applied in the case of Muhammedans in *Jeswant Singh Ji Ubby Singh Ji* v. *Jet Singh Ji Ubby Singh Ji* (3 Moo. I. A. 245). Unless it be shown that the parties to the marriage had no access, the fact that the woman was living in notorious adultery will not be sufficient to rebut the presumption of legitimacy. Under English law the presumption may be rebutted by proof of the impotency of the husband. The above section scarcely makes provision for this. When non-access is proved until within six months of the woman's delivery, the husband will be presumed, in accordance with the invariable course of nature, not to be the father of the child.[2] As to "conclusive proof," see section 4, *ante*. It may be supposed that the provisions of this section will supersede certain rather absurd rules of Muhammedan law, by which a child born six months after marriage, or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring. See the Hedaya, Chapter XIII, and Macnaghten's Hindu Law, Chapter VIII, § 31.

Proof of cession of territory.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler,[3]

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[2] 1 Macqueen's Scotch Appeal Cases, House of Lords, 277; *R.* v. *Luffe*, 8 East Reports, 202.

[3] See, for example, *Gazette of India*, 1873, Part I, page 2.

shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

The effect of this section and the power of the Indian Legislature to enact it were discussed in the case of *Dámodar Gordhan* v. *Ganesh Devrám*, 10 Bom. H. C. Rep. 87), on appeal to the Privy Council, *Dámodhar Gordhan* v. *Deorám Kanji* (I. L. R. 1 Bom. 367: L. R. 3 I. A. 192). The Lords of the Privy Council here said :—"Nothing, in their judgment, turns in this case upon The Indian Evidence Act of 1872, section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vict. cap. 67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession." See also *Lachmi Narain* v. *Partap Singh* (I. L. R. 2 All. 1), where the opinion expressed by the Privy Council in the last case was followed, and it was held that the British Crown has the power, without the intervention of Parliament, to make a cession of territory within British India to a foreign prince or feudatory. As to "conclusive proof," see section 4, *ante*. See in connection with this section, clause 7, section 3, Bengal Regulation XIV of 1825, which enacts that, for the purposes of that Regulation (*viz.*, the inquiry into the validity of lakhiraj grants), the following shall be held to be the periods at which the several provinces subordinate to the Bengal Presidency were acquired by the British Government, namely, for Bengal, Behar, and Orissa (excepting Cuttack), the 12th August 1765: for Benares, the 1st July 1775: for the provinces ceded by the Nawab Vizier, the 1st January 1801: for the provinces ceded by Daulat Rao Scindia and the Peshwah, the 1st January 1803: for the provinces of Cuttack, Puttaspore and its dependencies, the 14th October 1803: for the pergunnah of Khandah, and the other territory ceded by Nana Govind Rao, the 1st November 1817.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

When the possession is very recent, the presumption usually made is that of *theft* (see *Queen* v. *Sharafudin*, 13 W. R. Cr. 26 and *Queen* v.

Parmeshar Abir, 23 W. R. Cr. 16). In order to warrant the presumption of *receiving*, it has been thought that there should be evidence of some other person having committed the theft; see the observations of *Patteson, J.*, in the cases of *R.* v. *Densley*, 6 C. and P. 399: and *R.* v. *Woolford*, 1 M. and Rob. 384. What amounts to recent possession sufficient to justify the presumption in any particular case varies according as the stolen article is or is not calculated to pass readily from hand to hand. See the cases quoted, Roscoe, pp. 18—20: Taylor, § 122; § 140, 8th edn. and *Queen* v. *Moti Jolaha*, 5 W. R. Cr. 66: *Queen* v. *Bishu Manjhi*, 9 W. R. Cr. 16; *in the matter of Mir Yar Ali*, 13 W. R. Cr. 70: *Queen* v. *Bajo Hari*, 19 W. R. Cr. 37; *in the matter of Ramjoi Karmokar*, 25 W. R. Cr. 10, and *Ina Sheikh* v. *Queen-Empress*, I. L. R. 11 Calc. 160. A person who receives the proceeds of a number of different robberies from a number of different thieves on the same day is not to be presumed to be a habitual receiver of stolen goods within the meaning of section 413, Penal Code: *Queen-Empress* v. *Baburam Kanjari*, I. L. R. 19 Calc. 190. In cases in which murder and robbery have been shown to form parts of one transaction, the recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on a charge of robbery would similarly be evidence against him on a charge of murder: *Queen Empress* v. *Sami*, I. L. R. 13 Mad. 132.

(*b*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

See section 133, *post*, and the note thereto.

(*c*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

Bills of exchange and promissory notes form an exception to the general rule that the consideration for a contract must be proved. They are *primâ facie* presumed to be founded on a valuable consideration, partly to secure their negotiability, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed.—See Taylor, § 127: § 148, 8th edn. and Story on Bills, §§ 16, 178. Special rules of evidence providing that certain presumptions shall be made with regard to them until the contrary is proved, have been laid down by sections 118 to 122 of The Negotiable Instruments Act, XXVI of 1881.

(*d*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

The ordinary legal presumption is that things remain in their original state: *Jariat-ul-Batul* v. *Hossaini Begam*, 11 Moo I. A. 194. With regard to the presumption that arises as to the continuance of title, see *Ranjit Ram Panda* v. *Gobardhan Panda*, 20 W. R. 25: *Mahima Chandra De Sirkar* v. *Haro Lal Sirkar*, I. L. R. 3 Calc. 768: 2 C. L. R. 364: *Dharm Singh* v. *Har Prasad Singh*,

I. L. R. 12 Calc. 38; and *Raj Kumar Rai* v. *Gobind Chandra Rai*, I. L. R. 19 Calc. 660: L. R. 19 I. A. 140. As to the presumption with regard to the possession of waste and jungle land, see *Watson & Co.* v. *Government*, 3 W. R. 73: *Mahomed Basir* v. *Karim Baksh*, 11 W. R. 267: *Lilanand Singh* v. *Basirunnissa*, 16 W. R. 102: *Mitrojit Singh* v. *Radha Prasad Singh*, 23 W. R. 368. *Mochiram* v. *Bissambhar Rai Chaudhri*, 24 W. R. 410: *Mahomed Ibrahim* v. *Morrison*, I. L. R. 5 Calc. 36: *Ram Bandhu* v. *Kusu Bhutin*, 5 C. L. R. 481: and *Mohamed Ali Khan* v. *Abdul Ghani*, I. L. R. 9 Calc. 744: 12 C. L. R. 257. With regard to the presumption as to the possession of land formed by the gradual drying up of lakes or water channels, see *Radha Gobind Rai* v. *Inglis*, 7 C. L. R. 364: *Sunad Ali* v. *Karimunnissa*, 9 W. R. 124: and *Mohini Mohan Das* v. *Krishna Kishor Datta*, I. L. R. 9 Calc. 802: 12 C. L. R. 337. As to possession in the case of *char* land and land diluviated and then reformed by the gradual action of a river, see *Gokul Krishna Sen* v. *David*, 23 W. R. 443: *Kali Charan Sahu* v. *Secretary of State for India*, I. L. R. 6 Calc. 725: 8 C. L. R. 90: and *Man Mohan Ghosh* v. *Mathura Nath Rai*, I. L. R. 7 Calc. 225: 8 C. L. R. 126. As to the continuance of a private partition, see *Abhai Charan Sirkar* v. *Hari Nath Rai*, I. L. R. 8 Calc. 72: 10 C. L. R. 81.

(*e*) That judicial and official acts have been regularly performed;

Omnia præsumuntur rite esse acta—"All things are presumed to have been duly performed." See Taylor, §§ 124, 124A, 125, 126, 144, 147, 8th edn.; Broom's Legal Maxims, p. 907; see also *Banwari Das* v. *Muhammad Mashiat*, I. L. R. 9 All. 690 (as to presumption regarding compliance with the provisions of section 287, Civil Procedure Code); and *Ahsanullah* v. *Trilochan Bagchi*, I. L. R. 13 Calc. 197: *Rash Bihari Mukharji* v. *Pitambari Chaudhurani*, I. L. R. 15 Calc. 237 (as to absence of presumption of publication of notice required by section 52 of The Road Cess Act (IX B. C. of 1880): *Haro Dya Rai Chaudhri* v. *Mahomed Ghazi Chaudhri*, I. L. R. 19 Calc. 699 (as to absence of presumption of due publication of notice before sale of a *patni talak* for arrears of rent): *Arman Khan* v. *Bama Sundari Dasi*, 25 W. R. 62: and *Hem Lata* v. *Sridhan Barua*, I. L. R. 3 Calc. 771. To render the deposition of a medical witness taken by a committing Magistrate admissible in evidence under section 509, Code of Criminal Procedure, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under section 80, nor ought it to presume under either section 80 or section 114 Illustration (*e*) of The Evidence Act that the deposition was so taken and attested: *Queen-Empress* v. *Pohp Singh*, I. L. R. 10 All. 174: *Queen-Empress* v. *Riding*, I. L. R. 9 All. 720: *Queen-Empress* v. *Kachali Hari*, I. L. R. 18 Calc. 129.

(*f*) That the common course of business has been followed in particular cases;

As for example, the course of business in the Post-office. See section 16, and note thereto, *ante*, pp. 121, 122.

(*g*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

See Taylor, §§ 101, 499, 729: §§ 116, 555, 804, 8th edn., and the case of *Armory* v. *Delamirie*, 1 Smith's Leading Cases, 357, in which a jewel found by a chimneysweeper's boy was presumed to be of the best description as against the jeweller who had received it from the boy and refused to return it. See also *Framji Hormasji* v. *The Commissioner and Deputy Commissioner of Customs, Bombay*, 7 Bom. H.C. Rep. A.C. 89, and *Sundar Mani Chaudhrani* v. *Bhubon Mohan Chaudhri*, 11 W. R. 536. *Ardeshir Dhanjibhai* v. *Collector of Surat*, 3 Bom. A. C. 116: and *Ram Prasad* v. *Raghunandan Prasad*, I. L. R. 7 All. 738. In this last mentioned case, three important documents of the defendants were said to have been burnt, but this fact was not proved, and it was said that in the circumstances the non-production of the documents subjected the defendants to have raised against them the presumption recognised by this illustration. As to the inference from not calling witnesses for the prosecution who might naturally be expected to be called, see *Empress* v. *Dhanu Kazi*, 10 C. L R. 151: I. L. R. 8 Calc. 121: *Queen-Empress* v. *Tulla*, I. L. R. 7 All. 904: *Empress* v. *Kali Prasanna Das*, I. L. R. 14 Calc 215: *Queen-Empress* v. *Stanton and Flynn*, I. L. R. 14 All. 521. No inference unfavorable to the accused should be drawn from the circumstances that he has not adduced evidence: *Empress* v. *Hari Charan Chakrabartti* I. L. R. 10 Calc. 140: 13 C. L. R. 358.

(*h*) That, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

See sections 9—12 of The Indian Oaths Act, X of 1873.

(*i*) That, when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

See Taylor, § 146 and cases there quoted; also *Shearman* v. *Fleming*, 5 B.L. R. 619; and *Abdul Karim* v. *Manji Hansraj*, I. L. R. 1 Bom. 295.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

As to illustration (*a*)—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b*)—a crime is committed by several persons, A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in a such a manner as to render previous concert highly improbable :

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (*d*)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (*e*)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (*f*)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (*g*)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (*h*)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (*i*)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

History of presumptions.

Presumptions have usually been divided by English text-writers into two classes: *viz.*—*presumptions of law* and *presumptions of fact*. Presumptions of law consist of rules which in certain cases either prohibit or dispense with any ulterior enquiry. They are founded either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. Where the uniform experience of mankind has found this connection to exist, the law recognizes it without further proof. The correctness of the presumption is more or less probable in proportion to the uniformity of the experience. Presumptions of law have, therefore, been divided into two kinds—*Conclusive* and *disputable*.

Conclusive presumptions of law.

"*Conclusive*, or, as they are elsewhere termed, *imperative*, or *absolute* presumptions of law," says Mr. Taylor, "are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is

otherwise. They consist chiefly of those cases in which the long experienced connection, just alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and, therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."* As has already been pointed out, these presumptions correspond with "*conclusive proof*," as defined in section 4, *ante*. The Evidence Act creates two such presumptions, namely, as to legitimacy (section 112), and as to cession of territory (section 113): and there are some others to be found in the Indian Statute Book: *e.g.*, a declaration made under section 6 of The Land Acquisition Act, X of 1870, and published in the *Gazette*, is conclusive evidence that the land which forms the subject thereof is needed for a public purpose or for a company (see section 6 of the Act):—a statement by a Magistrate to the effect that a proclamation was duly made for a person charged with a warrant offence who has absconded is, under section 87 of the Code of Criminal Procedure, conclusive evidence of due compliance with the law:—a certificate given to a purchaser at a sale for arrears of land-revenue, or of public demands recoverable as land-revenue, is, under section 8, Act VII (B. C.) of 1868, conclusive evidence that all the necessary notices have been served and posted:—but see *Balmakund Lal* v. *Tirjudhan Rai*, I. L. R. 9 Calc. 271: the register prepared under section 26 of "The Chota Nagpore Tenures Act," II (B. C.) of 1869, is conclusive evidence of all matters recorded therein in pursuance of the Act:—a notification by the Local Government under section 5 of "The Criminal Tribes Act," XXVII of 1871, is conclusive proof (section 6, *idem*) that the provisions of the Act are applicable to the tribe, gang, or class specified therein:—a notification under section 3 of The Scheduled Districts Act, XIV of 1874, is conclusive as to what enactments are in force, or not in force, in any Scheduled District (section 4); and when any question arises as to the line of boundary between a Scheduled District and other territory, the determination thereof by an officer appointed under section 8, if confirmed by Government, is conclusive in all Courts of Justice. See also (as to the boundary of the Sunderbuns) *Baroda Kanth Rai* v. *The Commissioner of the Sunderbuns*, 2 B. L. R. F. C. 41.

Disputable presumptions of law.

Disputable, or, as they have been otherwise termed, *rebuttable* presumptions, are "as well as the former," says Mr. Taylor, "the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode the law

* § 62; § 71, 8th edn.

defines the nature and amount of the evidence which is sufficient to establish a *primâ facie* case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions, as in the former, have been adopted by common consent, from notives of public policy and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised. Thus, as men do not generally violate the Penal Code, the law presumes every man *innocent*; but some men do transgress it; and therefore evidence is received to repel this presumption." §§ 95, 96; §§ 109, 110, 8th edn. Sections 79, 80, 81, 82, 83, 84, 85, and 89, of this Act create presumptions corresponding to those here described, and there are others to be found in the Indian Statute Book.

Presumptions of fact.

"Presumptions of fact," says Mr. Taylor, "usually treated as composing the second general head of presumptive evidence, can hardly be said with propriety to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premiss is not a rule of law: they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connections, which are shown by experience, irrespective of any legal relations. The differ from presumptions of law in this essential respect, that while *those* are reduced to fixed rules, and constitute a branch of the system of jurisprudence, *these* merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid of control of any rules of law. Such for example, is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered."[5]

Subject of presumptions how dealt with in Indian Evidence Act.

The view taken of the subject of presumptions, and the mode in which the subject has been dealt with by the authors of The Indian Evidence Act, is briefly as follows. It was considered that many topics which, properly speaking, have nothing to do with the law of evidence, have been treated under the head of presumptions by English text-writers.[6] Those which were considered to be of real practical importance have been included in the sections of the Act already referred to.

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[5] § 169; § 214, 8th edn.

[6] "The subject of presumptions," said Sir J. F. Stephen, in moving that the Report of the Select Committee on the Bill be taken into consideration, "is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A

"They fall under these heads," said Sir J. F. Stephen: "1*st*—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons: the inference of legitimacy from marriage is a good instance. 2*ndly*—There are several cases in which Courts would be at a loss as to the course which they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them. A new section (114) has been added to this chapter, which deserves special notice. . . . . The fact of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject.[7] The illustrations[8] given are, for the most part, cases

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presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number, and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable; *Præsumptiones juris et de jure*, *Præsumptiones juris* and *Præsumptiones facti*. There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the law of evidence many subjects which in no way belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption and hands the subject over from the Law of Evidence with which it is accidentally connected to criminal law to which it properly belongs." *Proceedings of the Legislative Council of the 12th March, 1872, page 233 of the Supplement to the "Gazette of India" of March 30th*, 1872. See also pages 131—133 of Sir J. F. Stephen's work, "The Indian Evidence Act with an introduction on the Principles of Judicial Evidence."

[7] In his "Introduction" Sir J. F. Stephen says:—"The terms of this section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration. All notice of certain general legal principles, which are sometimes called presumptions, but which in reality belong rather to the substantive law than to the law of evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that The Evidence Act was the proper place for them." (p. 133.)

[8] Illustrations ought never to be allowed to control meaning of the section: *Kailash Chandra Ghosh* v. *Sonatan Chang Barui*, I. L. R. 7 Calc. 135: although attached to, they do not in legal strictness form part of the Acts, and are not absolutely binding on the Courts: *Nanak Ram* v. *Mehin Lal*, I. L. R. 1 All. 495.

of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand. At all events it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious."[9]

Artificial and technical rules thus finding no place in The Indian Evidence Act, and the Courts being as free in this respect as they were before the Act was passed, to use their own common sense and experience in judging of the effect of particular facts, it will be useful to notice certain principles in the nature of presumptions which have usually guided the Courts in dealing with certain questions peculiar to India. When a Hindu family lives in commensality and possesses joint property, the presumption is that all the property of which the members are in possession is joint estate, and that all acquisitions have been made from joint funds; and, as already pointed out (*ante*, page 466), the burden of proving any part of such property to be separate or self-acquired is upon the person who alleges that it is so (*Dharm Das Pande* v. *Shama Sundari Debi*, 3 Moo. I. A. 229: *Gopi Krishto Gosain* v. *Ganga Prasad Gosain*, 6 Moo. I. A. 53: *Naraganty Lakshmi Davamah* v. *Vengama Naidu*, 9 Moo. I. A. 66: *Pran Krishna Pal Chaudhri* v. *Mathura Mohan Pal Chaudhri*, 10 Moo. I. A. 403: *Abed Ali Mirza* v. *Moheshur Baksh Singh*, Sev. August—December, 1863, p. 801: *Tara Charan Mukharji* v. *Jai Narain Mukharji*, 8 W. R. 226: *Sridhar Narain* v. *Madhu Persad*, 8 W. R. 294).

Principles in the nature of presumptions peculiar to India.

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[9] *Proceedings of the Legislative Council, pages* 234—235 *of the Supplement to the Gazette of India of* 30*th March* 1872.

In the last case the person who set up the allegation of separate acquisition, had purchased at an execution-sale the rights of one member of the family. Whether in order to raise this presumption in respect of acquisitions it must be admitted (as in *Prankishlo Mazumdar* v. *Bhagirati Guptia*, 20 W. R. 158), or proved, that there was a nucleus of joint property from which such acquisitions could have been made, or the presumption arises from the bare fact of the family being joint, is a question upon which there is some apparent difference of opinion. In *Tarak Chandra Poddar* v. *Jodeshar Chandra Kundu* (11 B. L. R. 193 : 19 W. R. 178), *Couch, C. J.*, said :—"The Judicial Committee of the Privy Council in *Nil Krishto Deb Barmano* v. *Bir Chandra Thakur* (3 B. L. R. P. C. 13 : 12 Moo. I. A. 523) have laid down the rule by which this Court must be guided. Their Lordships say :—'The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption ; but the members of the family may sever in all or any of these three things . . . . . .' These observations have reference to the particular case before their Lordships, but here they lay it down in most distinct terms that every Hindu family is presumably joint in food, worship, and estate ; and the same law had been laid down in the previous case of *Naraganty Lachmi Davamah* v. *Vengama Naidu* (9 Moo. I. A. 66), where it is said that the presumption with regard to a Hindu family is that it remains undivided. In another case before the Judicial Committee—*Dharm Das Pande* v. *Shama Sundari Debi* (3 Moo. I. A. 229)—we find the law laid down which is applicable to the case before us. Their Lordships say :—'It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is, that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. . . . .' Now, with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. . . . . It was argued before us, and reference was made to the case of *Beni Madhub Mukharji* v. *Bhagobati Charan Banarji* (8 W. R. 270), that it was not shown here that there was any nucleus of property by means of which this acquisition might have been made, and that at least the plaintiffs ought to have given some evidence of that. I must observe that what is said in that case about there being a nucleus of property is only a *dictum* ; no doubt it would be very useful for the plaintiffs to show that, but I cannot agree that they are bound to do it. That *dictum* seems to me to be inconsistent with the doctrine laid down by the

Judicial Committee."[1] The question was further discussed in the following cases:—*Bhola Nath Mahta* v. *Ajudhya Prasad Sukul*, 12 B. L. R. 336: 20 W. R. 65: *Dinonath Sha* v. *Harinarain Sha*, 12 B. L. R. 349: *Gobind Chandra Mukharji* v. *Durga Persad*, 14 B. L. R. 349: 22 W. R. 248. In the second of these cases, *Pontifex, J.*, said:—"I must confess that, if I had to give my opinion upon these conflicting authorities as to whom the onus is to be on, I should be inclined to consider that, when property has been purchased by an individual member of a family, it is necessary for those who claim it as joint property to show that there was a nucleus of joint property out of which it could have been purchased. That position has been held by *Mitter, J.*, in *Dhanukdhari Lal* v. *Ganpat Lal* (11 B. L. R. 201); by *Phear, J.*, in *Shiu Gholam Singh* v. *Baran Singh* (1 B. L. R. A. C. 164); and by *Jackson* and *Mitter, JJ.*, in *Radhika Persad De* v. *Dharma Dasi Debi* (3 B. L. R. A. C. 124). Otherwise it seems to me that it would be necessary to apply a double presumption, namely, first, that the family was joint; and secondly, that the family was possessed of property." This was however but an *obiter dictum*, as the point was not decided in the case. A family may be joint in mess without being joint in estate. If there be no estate, the family cannot be joint in estate, and there is no fund from which acquisitions can be made. The state of things in respect of which the presumption arises has here no existence; and it may be argued that, under such circumstances, there is no place for the presumption.[2]

The presumption will not be sufficiently rebutted by evidence that the name of one member of the family only appeared as that of sole owner in revenue records or in other documents relating to the property: *Chitha* v. *Mihin Lal*, 11 Moo. I. A. 369: *Haider Hosein* v. *Mahomed Hosein*, 14 Moo. I. A. 401: *Jasundah* v. *Ajodhia Persad*, 2 Jur. N. S. 261: *Janki Dasi* v. *Krishto Kamai Singh*, Marsh Rep. 1)—nor by evidence of separation in mess merely[3] (*Beni Madhab Mukharji* v. *Bhagobati Charan Banarji*, 8 W. R. 270: *Anandi Kunwar* v. *Khedu Lal*, 14 Moo. I. A. 412)—nor in the case of further acquirements, by mere evidence that the consideration-money passed out of the hands of the member claiming the purchased property as self-acquired without its being shown that the funds were exclusively his own (*Kunj Behari Dutt* v. *Khetarnath Dutt*, 8 W. R. 270). Nor will evidence that several parcels are held in severalty rebut the presumption in respect of the rest of the estate (*Sriram Ghosh* v. *Srinath Dutt Chaudhri*, 7 W. R. 451). In *Bodh Sing Dudhuria* v. *Ganesh Chandra Sen*

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[1] The learned Chief Justice further expressed his dissent from the following cases:—*Khilat Chandra Ghosh* v. *Kunj Lal Dhar*, 11 B. L. R. 194 note: 10 W. R. 333: *Subhadar Dasi* v. *Balaram Dewan*, W. R. Sp. No. 67: *Shiu Ghulam Singh* v. *Baran Singh*, 1 B. L. R. A. C. 164—and approved of *Kunjbihari Dutt* v. *Khetarnath Dutt*, 8 W. R. 270.

[2] No such presumption can properly be raised as regards Muhammadans living in commensality (*Hakim Khan* v. *Gul Khan*, I. L. R. 8 Calc. 826: 10 C. L. R. 603.

[3] Separation in both dwelling and food may, however, be sufficient to raise the presumption of separation in estate—*Jagan Koer* v. *Raghu Nandan Lal Sahu*, 10 W. R. 148.

(12 B. L. R. P. C. 326-327; 19 W. R. 356), the status of the family was thus described:—"The evidence of the witnesses and of those members of the family who have been examined, clearly shows that, though the family were joint in food and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindú family in the ordinary sense of the term—that is, as a family having all things in common, all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family." The Privy Council said:—"Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindú law as to property in the name of one member of a joint family; and to throw upon those who claim as joint property that of which they have allowed their coparcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence." Upon the subject of evidence to rebut the presumption, see also *Moro Viswanath* v. *Ganesh Vithal* (10 Bom. H. C. Rep. 453). It was here suggested that the presumption of union is stronger as between brothers than as between cousins, and the presumption is weaker, the farther from the common ancestor the descent has proceeded.

Hindú endowments.

Endowments made by Hindús for the worship of idols are presumed to be intended to preserve the *shiba* in the family rather than to confer a benefit on an individual; but this presumption may be rebutted by the absence of any language denoting the intention of the donor that the gift should belong to the family, as for example, by the absence of words of inheritance or of any reference to family or descendants (*Chandra Nath Bai* v. *Gobindnath Bai*; *Collector of Murshedabad* v. *Shibessari Debya*, 11 B. L. R. 114).

Family custom.

Where an ancient family custom is proved to have existed among Hindús, the presumption is in favour of the continuance of that custom even though the family have migrated (*Surendranath Rai* v. *Hiramani Barmani*, 1 B. L. R. P. C. 26). In the case of a family who had emigrated from a part of the country governed by the Mitakshara law, it was presumed that they continued to be governed by that law until it was shown that they had adopted the law of their new domicile in Bengal (*Pirthi Singh* v. *Sheo Sundari*, 8 W. R. 261). This presumption has been held to be sufficiently rebutted by evidence showing that, except as regarded marriage, all other ceremonies in the family were performed according to the law of the Bengal school and by Bengal priests (*Ram Bromo Pandah* v. *Kamini Sundari Dasi*, 6 W. R. 295).

The habit of holding land *benami* is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership (*Bazlur Rahim* v. *Shamsunissa Begam*, 11 Moo. I. A. 602; *Srimun Chandra De* v. *Gopal Chandra Chakravartti*, 11 Moo. I. A. 28; and see *Mohesh Chandra Bandapadhya* v. *Barada Debi*, 2 B. L. R. A. C. 275). Under English law, when real estate is purchased by a father *in the name of* his son, a presumption arises that the purchase was intended for the son's advancement,* and the son will take the property so purchased. But no such presumption arises under Hindú law; and when immoveable property is purchased by a Hindu in the name of his son, the presumption is, that it is a *benami* purchase merely, and that the property belongs to the father. If the person in whose name it was purchased alleges that he is solely entitled to the legal and beneficial interest in such property, the burden of proving this will lie upon him (*Gopi Kristo Gosain* v. *Ganga Prasad Gosain*, 6 Moo. I. A. 53; *Bhagbat Chandra De* v. *Haro Gobind Pal*, 20 W. R. 269; *Naginbhai* v. *Abdulla*, I. L. R. 6 Bom. 717). As to property purchased in the name of a Hindú wife, see *Chaudhrani* v. *Tarini Kanth Lahiri Chaudhri*, I. L. R. 8 Calc. 545; 11 C. L. R. 41, from which distinguish *Nabin Chandra Chaudhri* v. *Dakhoyani Dasi*, I. L. R. 10 Calc. 686, where the question was whether property standing in the name of a Hindú wife was to be presumed to be joint family property. In the case of *Brajo Sundari Debya* v. *Lachmi Kumwari*, (20 W. R. 95) the same presumption was applied to a case in which a man purchased property in the name of his own idol, whom no one except himself had the power or right to worship: and it was held that in such a case the property is not the property of the idol but of the person who purchased it. It might be otherwise if the idol were set up for public worship, and if there was clearly an endowment for the benefit of the public. The same principle applies in the case of Muhammadans and of a purchase made by a Muhammadan father in the name of a son (*Azhar Ali* v. *Altaf Fatima*, 13 Moo. I. A. 232; or in the name of his wife (*Sarnamayi* v. *Luchmipat Dugar*, 9 W. R. 338). The presumption that the purchase was an ordinary *benami* one may be rebutted by evidence showing that the father's object was to affect the ordinary rule of succession as from him to the property purchased (*Azimut Ahmed Ali Khan* v. *Hardwari Mull*, 13 Moo. I. A. 401; 5 B. L. R. 578). It was also here laid down, that when *bona fide* creditors seek to render liable property of which their debtor is the ostensible owner, it is the duty of a Court of Justice to put those who object on the ground that he only held *benami*, to strict proof of such objection. See also on this point, *Naginbhai* v. *Abdulla*, I. L. R. 6 Bom. 717. It may be observed that the usual mode of proving a purchase to be a *benami* one is to show that the funds with which the purchase was made were exclusively the funds of the person alleged to be the real owner of the property (*Gopi Krishto Gosain*

Benami transactions.

* The doctrine of *advancement* will be found fully treated in *Dyer* v. *Dyer*, 1 *Leading Cases in Equity*, 184, and in Story's *Equity Jurisprudence*, 1202—1205.

v. *Ganga Pershad Gosain*, 6 Moo. I. A. 53: *Azhar Ali* v. *Altaf Fatima*, 13 Moo. I. A. 232). See also *ante*, p. 462.

As to suits by a *benamidar*, it has been said that so long as the *benami* system is to be recognised in this country, the proper rule is that in the absence of evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself: *Hori Nath Chobe* v. *Bhagwat Prasad*, I. L. R. 10 Calc. 697.

Doctrine of satisfaction.

According to English law, as administered in Courts of Equity, if a person being indebted to another in a sum of money give him by will a sum as great as, or greater than, the debt without taking any notice or making mention of the debt, such bequest shall nevertheless be in satisfaction of the debt, so that the creditor shall not have both the debt and the legacy—*Debitor non præsumitur donare*. This presumption has been followed in India, and when a Muhammadan husband, who had agreed to give his wife a dower of five lakhs of Lucknow rupees, subsequently directed four and-a-half lakhs sicca rupees of Company's paper to be set aside for her, this was presumed to be in satisfaction of dower and not a gift[5] (*Iftikharannissa* v. *Amjad Ali Khan*, 7 B. L. R. P. C. 643). The Indian Succession Act does not follow the doctrine of satisfaction as administered by Courts of Equity. When a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor is entitled both to the legacy and to the amount of the debt (section 164, Act X of 1865). When a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion (section 165, *idem*). No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee (section 166, *idem*). As to the presumption of English law that a gift made under certain circumstances is a *donatio mortis causâ* being inapplicable to *Hindûs*, see *Upendra Krishna Deb* v. *Nobin Krishna Basu*, 3 B. L. R. O. C. 121.

Presumptions as to land.

The hereditary nature of a tenure or *talâk* may be presumed from evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son, notwithstanding the absence of "words of inheritance" in the instrument by which the tenure was originally created (*Gopal Lal Thakur* v. *Tilak Chandra Rai*, 10 Moo. I. A. 191: 3 W. R. P. C. 1: *Dhanpat Singh* v. *Guman Singh*, 11 Moo. I. A. 465: *Satyasarran Ghosal* v. *Mohesh Chandra Mitra*, 12 Moo. I. A. 268: 2 B. L. R. P. C. 23: 11 W. R. P. C. 10: *Kâlâp Narain Singh* v. *The Government*, 14 Moo. I. A. 247: 11 B. L. R. 71: *Manranjan Singh* v. *Lilanand*

[5] The doctrine of *satisfaction* will be found fully treated in *Ex-parte Pye*, *Leading Cases in Equity*, 331.

Singh, 3 W. R. 81: *Nubo Durga Dasi* v. *Dwarkanath Rai*, 24 W. R. 301: *Karunakar Mahanti* v. *Nidhiro Chaudhri*, 5 B. L. R. 655: 14 W. R. 107; *Lakhi Kowar* v. *Hari Krishna Singh*, 3 B. L. R. A. C. 226. 12 W. R. 3). The words "*makarrari istemrari*" create an hereditary right in perpetuity: *Brajanath Kundu Chaudhri* v. *Lakhi Narain Addi*, 7 B. L. R. 211. In this last case a *mauras* or inheritable title was presumed from continuous payment of rent for more than a hundred years. In *The Salur Zemindar* v. *Pedda Pakir Raju* (I. L. R. 4 Mad. 371) successive enjoyment for three generations, without interference, of land granted by a zamindar to a member of his family in lieu of maintenance, was held to justify the presumption that the original grant was intended to be absolute. "In England proof of the possession of land or of the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land-revenue to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger, if it be proved that the estate has passed on one or more occasions from ancestor to heir" (*Collector of Trichinopoly* v. *Lekkamani*, 14 B. L. R. 139 L. R. 1 I. A. 282). The general presumption is in favour of the liability of land to assessment, and the claimant of *lakhiraj* must establish his claim not by inferences and presumptions, but by the positive proof required by the Regulations (*Mahtab Chand* v. *The Bengal Government*, 4 Moo. I. A. 497 but see *ante*, pp. 481 482. A purchaser at a sale for arrears of Government revenue "is remitted to all the rights which the original settler at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zamindars since that date. In the assertion of this right the auction purchaser is, no doubt, in many cases, allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent. That presumption, however, is founded not so much upon the principle just mentioned, as upon the principle that every *bigha* of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zamindar to enhance rent is also presumable until the contrary be shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction-purchasers; and they have had to prove in circumstances of great difficulty that their tenure did really exist at the date of the perpetual settlement or even twelve years before, in order to escape the consequences of the claim. It is, however, to be observed that the course of modern legislation and also of modern decision has, if not in the case of *lakhiraj* lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases by giving force to the contrary presumptions arising from proof of long and undisturbed possession" (*Forbes* v. *Mir Mahomed Hosen*, 12 B. L. R. 215: 20 W. R. 44). The purchaser at such a sale must take some clear step for

avoiding or cancelling the tenure, otherwise the presumption will be that the tenure is unaffected (*Sarnomayi* v. *Satish Chandra Rai*, 10 Moo. I. A. 123: *Ahamullah* v. *Abhai Chandra Rai*, 13 Moo. I. A. 318). When a person, who claims to be the absolute owner of an estate, borrows money to pay off mortgage there being no intermediate incumbrance, the presumption is that he intends to extinguish such mortgage and not to keep it alive (*Mahesh Lal* v. *Mohant Bawan Das*, L. R. 10 I. A. 62 I. L. R. 9 Calc. 961). But it should always be considered what was his intention, and in the absence of evidence to the contrary it is to be presumed that he intended to keep the prior charge alive for his own benefit (*Gokaldas Gopaldas Purandas* v. *Premsukh Das*, I. L. R. 10 Calc. 1035). It may be presumed that the site of a road belongs to the adjoining proprietors, half to each up to the middle of the road, in the absence of evidence that either proprietor gave the whole of the land (*Mobarak Saha* v. *Tofani*, I. L. R. 4 Calc. 206).

Presumption from possession.

Title is to be presumed from lawful possession, until the want of title or better title be proved:—*Haiman Chull Singh* v. *Gunsheam Singh*, Suth. Priv. Coun. App. 4. *Pedda Vencatapa Naidu Bahadur* v. *Arivala Rudrapa Naidu*, *idem*, 112. *Baradakant Rai* v. *Chandra Kumar Rai*, 12 Moo. I. A. 225; 2 B. L. R. P. C. 1: *Trilochan Ghosh* v. *Kailas Nath Sidhanto Bhunik Bhattacharjya*, 3 B. L. R. A. C. 298: 12 W. R. 175: *Selam Sheikh* v. *Baidonath Ghatak*, 3 B. L. R. A. C. 312: *Kali Chandra Sen* v. *Adu Sheikh*, 9 W. R. 602: *Wali Ahmad Khan* v. *Ajudhya Kandu*, I. L. R. 13 All. 537. And see *ante*, p. 505. When a tenant under a lease having a term holds over after the expiry of the term, he is presumed to hold subject to all the conditions of the lease which are applicable to his new position. (*Inayatullah* v. *Ilahi Baksh*, W. R. (1864) Act X, 42: *Jamaut Ali Shah* v. *Chattardhari Sahi*, 16 W. R. 195: *Tara Chandra Banarji* v. *Amir Mandal*, 22 W. R. 394: *Allah Bibi* v. *Jugal Mandal*, 25 W. R. 234; and section 54, Act VIII of 1885). When payment of the rent of a particular year is admitted or proved, there is a presumption that the rent of previous years has been paid, unless the contrary be shown (*Surath Sundari Debi* v. *Brodie*, 1 W.R. 274: *Enayat Hoser* v. *Didar Baksh*, W. R. (1864) Act X, 97: *Mitrajit Singh* v. *Choker Narain Singh*, 2 W. R. 58).

Presumption from evidence with-held.

When mortgagees in possession refuse to produce their accounts, every reasonable presumption may be made against them and in favour of the mortgagors as to the amount realized from the property. But even such a presumption *in odium spoliatoris* must have reasonable limits (see an example of such reasonable limits in *Shah Makhan Lal* v. *Sri Krishna Singh*, 2 B. L. R. P. C. 58; 12 Moo. I. A. 198; 11 W R. P. C. 19). As to a mortgagee refusing to produce the mortgage-bond, which was insufficiently stamped, and the consequences of its non-production, see *Ganga Mallik* v. *Bayaji*, I. L. R. 6 Bom. 669. As to the presumption to be raised when persons, who have been in possession of lands and who therefore know the profits realized from them, refuse to produce the accounts and give information upon

facts of which they have special knowledge, see *Krishna Mohan Baisakh* v. *Kunjo Bihari Baisakh*, 9 C. L. R. 1. In connection with the presumption proper to be made from the fact of evidence being withheld, the following observations of their Lordships of the Privy Council in the case of *Bama Sundari Dasi* v. *Radhika Chaudhrain* (13 Moo. I. A. 269) may also be quoted—"Their Lordships have further to observe that, if the respondent's case were a true one, she should have had little difficulty in proving it. She does not come into Court as the purchaser at a sale for arrears of revenue, who rests upon a statutory title with no documents to support it. She derives title from the zamindar with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the zamindari. Her determination in such circumstances to rest upon the supposed defects in the appellant's proof, and to abstain from giving evidence of the truth of her own case affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage." See also *Ram Prasad* v. *Raghunandan Prasad*, I. L. R. 7 All. 738.

Presumption as to encroachments.

"The true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is, that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, it is a rule which is supported by reason and principle. In India, where there is a great deal of waste land and where quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely, that if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful" (*Guru Das Rai* v. *Issar Chandra Basu*, 22 W. R. 246). The same rule was laid down in *Nadiar Chand Shaha* v. *Miajan*, I. L. R. 10 Calc. 820, in which it was further held that when a tenant acquired a title against a third person by adverse possession, he has acquired it for his landlord and not for himself.

Presumption as to legitimacy among Muhammadans.

Muhammadan law raises a strong presumption in favour of legitimacy. Where a child has been born to a father, of a mother with whom there has not been a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan law, the presumption is in favour of such a marriage having taken place (*Hidayatula* v. *Jan Khanum*, 3 Moo. I. A. 295). This case was referred to in *Ashraful Daula Ahmed Hosein* v. *Haider Hosein Khan* (11 Moo. I. A. 94) as deciding that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment suffice to prove legitimacy; and it was

pointed out that mere continued cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimatize the offspring, unless it be accompanied with acknowledgment, or conduct equivalent to acknowledgment. "The binding decisions on this subject," it was said, "must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption" as that, "mere continued cohabitation alone suffices to raise such a legal presumption of marriage as to legitimatize the offspring." "The presumption of legitimacy from marriage *follows the bed*, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubinage may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumption of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to over-ride overbalancing proof, whether direct or presumptive." In *Khajurunnissa* v. *Roshan Jahan* (I. L. R. 2 Calc. 199) the legitimacy was presumed of a son, who, though not recognized by his father on any particular occasion, was always treated on the same footing as the other legitimate sons. "This of itself," said the Privy Council, "appears to their Lordships to raise some presumption that his mother was his father's wife." In the case of *Mahammed Bakir Hosein Khan* v. *Sharfanissa* (8 Moo. I. A. 136: 3 W. R. P. C. 37), the same principles were applied, and it was held that, under the circumstances of the particular case, the presumption of legitimacy was not justified. But, while arriving at this conclusion in that particular case, their Lordships guarded their judgment by saying that they wished to be distinctly understood as not denying or questioning the position that, according to Muhammadan law, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation. In *Jarlatul Batul* v. *Hossaini Begam*, 11 Moo. I. A. 194, it was contended that it should be presumed that a woman once a concubine had become the wife of a deceased Muhammadan owing to the lapse of time, the propriety of her conduct, and the confidence with powers of management reposed in her, but it was held that no such presumption could be made. See also *ante*, p. 161.

Marriage between Hindús in different sub-divisions of the Sudra caste being prohibited, and being possible only when sanctioned by special custom, no presumption as to the validity of such a marriage can be made from long cohabitation in the absence of proof of such special custom (*Narain Dhara* v. *Rakhal Gain*, I. L. R. 1 Calc. 1). But by the law of England, when the parties intend to become husband and wife and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption in favour of everything necessary to give validity to such marriage is one of exceptional strength, and unless rebutted by evidence strong, distinct, satisfactory and conclusive must prevail (*Lopez* v. *Lopez*, I. L. R. 12 Calc. 706). No such presumption arises in criminal cases. In such cases the strictest proof of marriage is required. So, in *Empress* v. *Pitambar Singh*, I. L. R. 5 Calc. 566, it was held that when marriage is an ingredient in an offence as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved. This was followed in *Empress* v. *Kallu*, I. L. R. 5 All. 233.

Presumption as to marriage.

It is a maxim of Hindú law in cases of adoption that "permission is to be presumed in the absence of prohibition," but this maxim relates to the person who gives, not to the person who receives, a child in adoption (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, and *Anand Chandra Chaudhri* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. 145). After a long lapse of time, and when there is satisfactory evidence of the recognition of adoption for a series of years, the presumption is that everything necessary to render the adoption valid has been performed (*Sabo Bewa* v. *Nahagan Mahanti*, 2 B. L. R. App. 51: *Nityanand Ghosh* v. *Krishnadoyal Ghosh*, 7 B. L. R. 5: *Rajendro Nath Haldar* v. *Jagendro Nath Banarji*, 14 Moo. I. A. 67). A child in India must in ordinary circumstances be presumed to have his father's religion, and his corresponding civil and social status, and it is therefore ordinarily and in the absence of controlling circumstances the duty of a guardian to train his infant ward in such religion (*Skinner* v. *Orde*, 14 Moo. I. A. 309). There is a presumption in Calcutta that where a vendor of goods deals with a *banian* of a European firm, *qua* banian, the principal does not incur any liability whatever, and the vendor so dealing can look to the banian only for the price (*Faizula* v. *Ram Kamal Mitra*, 2 B. L. R. O. C. 7). Where bills are produced by the acceptor after due date, and the drawer has received no notice of dishonour and no demand for the payment of such bills, the presumption is that they have been paid by the acceptor (*Shearman* v. *Fleming*, 5 B. L. R. 619). In a suit for damages for a malicious prosecution, malice may be inferred from the absence of reasonable cause (*Goday Narayan Gajpati* v. *Aukilam Venkata Garu*, 6 Mad. H. C. Rep. 85: *Bishonath Rakhit* v. *Ramdhan Sirkar*, 11 W. R. 42: *Ganga Persad* v. *Ramphal Sahu*, 20 W. R. 177). Delay in suing to enforce his rights raises a presumption unfavourable to the person who makes such delay. A and B, two riparian proprietors, were disputing about a *chur*. A was put in possession by the

Some other cases.

Magistrate in 1836. B did not sue to assert his rights till 1847. The Privy Council said :—"Their Lordships are of opinion that no sufficient explanation had been given for the very long delay on the part of the plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time" (*Shant Chand Baisakh* v. *Kissen Persad Sarma*, 14 Moo. I.A. 600). A Muhammadan widow was in possession of her husband's estate, which she claimed to hold, one-fourth by right of inheritance, and the rest on account of dower. She alleged her dower to be Rs. 40,000. The heirs of the remaining three-fourths, having the fullest notice of her pretension to hold the estate for her dower, took no step to dispute her claims, or disturb her possession for nearly ten years. "The proper inference from this conduct," said the Privy Council, "is, that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirms which they now set up and which must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained they might at any time have instituted a suit to obtain possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying on that very difficulty. Whilst the Judges of the High Court treat this conduct of the respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may fairly be done, that it is also indicative of a consciousness on their part that what the appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim (*Bachan* v. *Hamid Hossein*, 10 B. L. R. 54). No adverse presumption arises against a person who refuses to withdraw his case from the decision of the Court and submit it to arbitration (*Mahabir Singh* v. *Dhaijju Singh*, 20 W. R. 172). An indefinite or general hiring in India does not mean a hiring for a year certain as it does in England, nor is the mere payment of wages monthly sufficient to raise a presumption that a hiring is a monthly hiring (*Hughes* v. *The Secretary of State for India in Council*, 7 B. L. R. 689). The return to a writ of *habeas corpus* is not necessarily conclusive and does not preclude inquiry into the truth of the matters alleged therein, although the 56 Geo. III. cap. 100, which allows affidavits to be used to contradict the return in criminal matters, does not extend to India (*In the matter of Khatija Bibi*, 5 B. L. R. 537 : *sed contra*, *The Queen* v. *Vaughan*, 5 B. L. R. 418). It may be observed that the writ of *habeas corpus* cannot now be issued by the High Courts beyond the Presidency-towns—see section 82 of the Code of Criminal Procedure, Act X of 1872; and sections 2 and 491 of the Code of 1882.

CHAPTER VIII.

ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.[6]

Meaning of estoppel.

"An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith, in his note to the *Duchess of Kingston's* case, characterizes this definition as a *little startling*, but it nevertheless gives a good idea of what it is by no means easy to include within the limits of a definition. In *Mewa Kuwar* v. *Hulas Kuwar* (L. R. 1 I. A. 161 : 13 B. L. R. 312) the Privy Council said that those who rely upon a document as an estoppel—the *nature of an estoppel being to exclude an inquiry by evidence into the truth*—must clearly establish that it does amount to that which they assert.

Division of estoppels.

Lord Coke divided estoppels into three kinds, and this division has been usually followed by those who have since treated the subject—*viz.*, 1st, by matter of record; 2nd, by deed; 3rd *in pais*. Estoppel by matter of record is chiefly concerned with the admissibility and effect of judgments. This portion of the subject has been already disposed of (sections 40–44, *ante*). The authors of The Evidence Act have not regarded it as a branch of the subject of *estoppels*. With respect to *estoppels by deed*, Indian law does not recognize out of the Presidency towns the division of contracts into those not under seal termed *simple contracts* and those under seal termed *deeds* or *specialities*: and even in the Presidency-towns the distinction is not recognized where a Hindu

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[6] A case analogous to this illustration is to be found in *Radhey Lal* v. *Mahesh Prasad*, I. L. R. 7 All. 864. The provisions of section 43, Act IV of 1882, similarly make effectual a transfer by an unauthorized transfer or who subsequently acquires an interest in the property transferred.

or Muhammadan is the defendant (*Ram Gopal Law* v. *Bluquiere*, 1 B. L. R. O. C. 37). The principle that a man cannot be allowed to dispute the contents of a *deed*, a solemn instrument to which he has set his hand and seal, has therefore but little application in India, such application being limited to a portion of the community in the Presidency-towns (*Gauresallaba Ram Chandra* v. *Verappa Chett*, 2 Mad. Rep. 174). In another case it has been said that it would be inequitable that there should be anything in this country of the nature of the old English doctrine of estoppel by deed. It was therefore held that it was open to the defendant to plead that though he had nominally given a kabuliyat in favour of the plaintiff, yet he did not really contract with her at all (*Kedarnath Chakravartti* v. *Donzelle*, 20 W. R. 352 : 7 B. L. R. 720). So, a plaintiff who had executed a deed of conditional sale in favour of the defendant was held not estopped from showing that it had been executed merely in order to protect the property against the claims of the plaintiff's son (*Partam Singh* v. *Lalji Mal*, I. L. R. 1 All. 403). In order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage (*Bapuji* v. *Senavaraji*, I. L. R. 2 Bom. 231 : *Baksu Lakshman* v. *Govinda Kanji*, I. L. R. 4 Bom. 594 : *Mahadaji Gopal Bakhskar* v. *Vithal Ballal*, I. L. R. 7 Bom. 78 : *Hem Chandra Sur* v. *Kali Charan Das*, I. L. R. 9 Calc. 528 : 12 C. L. R. 287 : *Kashinath Das* v. *Harihar Mukharji*, I. L. R. 9 Calc. 898). A conveyance may be shown to be a mere benami transaction, and that the defendant is not the owner of the property, but merely the plaintiff's tenant in respect of it (*Sabaktulla* v. *Hari*, 10 C. L. R. 199). A stipulation in a bond that all payments should be endorsed on the back thereof, and that all other pleas of repayment should be futile, does not estop the defendant from proving by other means that the debt or part of it has been satisfied (*Kali Das Mitra* v. *Tara Chand Rai*, 8 W. R. 316 : *Hiridhari Singh* v. *Lalu Koer*, 3 W. R. Misc. 23 : *Narayanundir Palli* v. *Motilal Ramdas*, I. L. R. 4 Bom. 43). A mere recital in a deed does not operate as an estoppel (*Nanhu Saha* v. *Budhu Jamadar*, 13 W. R. 2 : *Gaurmani Debi* v. *Krishna Chandra Sanyal*, I. L. R. 4 Calc. 397). When both plaintiff and defendant professed to derive their title by virtue of a deed which the Court held to be invalid according to Muhammadan law, it was held that the defendant was not estopped from denying its validity (*Kavarbai* v. *Mir Alam Khan*, I. L. R. 7 Bom. 170). The instances given by Lord Coke of *estoppels in pais* are :—by matter *in pais*,[1] as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate. The inclination of the Courts has been to extend the principle of *estoppel in pais*, more especially in mercantile transactions, in which men must of necessity trust much to appearances and to the representations of others. The principle was thus stated by Lord Denman in *Pickard* v. *Sears* :[2]—"The rule of law is clear, that where one, by his words or conduct, wilfully

[1] *In pais* means "in the country," "before the public." Trial *in pais* is trial *by the country*, i.e., by a jury. Conveyances *in pais* are ordinary conveyances between two or more persons *in the country*, i.e., upon the land to be transferred.

[2] 6 Adolphus and Ellis's Reports, 475.

causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman* v. *Cook*,[2] Baron Parke said that the rule laid down in *Pickard* v. *Sears* "was to be considered as established; but that by the term 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth: and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect: as, for instance, a retiring partner omitting to inform his customers of the firm in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being authorized."[1] "If a man," writes Mr. Justice Story, "having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person as grantor execute a deed of conveyance of land belonging to himself, and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance. So, if a party having a title to an estate should stand by, and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a Court of Equity to assert that title against such purchaser, at least, not without fully indemnifying him for all his expenditures. The same rule has been applied both at law and in equity, where the owner of chattels, with a full knowledge of his own title, has permitted another person to deal with these chattels as his own in his transactions with third persons, who have bargained and acted in the confidence that the chattels were the property of the person with whom they dealt, for in cases where one of two innocent persons must suffer a loss, a

[2] 2 Ex. Ch. 654. As to the effect of substituting, in the section of The Indian Evidence Act, "intentionally" for "wilfully," see the observations in *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri*, I. L. R. 7 Mad. 8, which, however, were dissented from by their Lordships of the Privy Council in *Sarat Chandra De* v. *Gopal Chandra Laha*, L. R. 19 I. A. 203: see *post*, p. 547.

[1] The English cases will be found collected in Mr. Smith's note to the *Duchess of Kingston's* case (second volume of Leading Cases); and in Mr. Taylor's work on Evidence, § 769 (§ 839, 8th edn.) and following paras. They have been referred to above only so far as was sufficient to illustrate and explain the principle discussed.

fortiori, in cases where one has misled the other, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it" (§ 385).[2]

In *Carr* v. *London and North-Western Railway Company* (L. R. 10 C. P. 307) four *recognized propositions* of an estoppel *in pais* were enunciated by the Court, which said:—"One such proposition is if a man by his words or conduct *wilfully endeavours* to cause another to believe in certain state of things which the first *knows to be false*, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

Four modes in which estoppel may arise.

"Another recognized proposition seems to be that if a man, either in express terms or by conduct, *makes a representation* to another of the existence of a certain state of facts *which he intends to be acted upon in a certain way*, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

"And another proposition is that, if a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation* of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

"There is yet another proposition as to estoppel. If in the transaction itself, which is in dispute, one has *led another into the belief of a certain state of facts by conduct of culpable negligence*, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

In *Swan* v. *N. B. Australasian Company* (2 H. & C. 175) *Blackburn, J.*, said that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.

Chapter VIII of The Indian Evidence Act is concerned with estoppels of this class (i. e., *in pais*)[3] The principle which forms the subject-matter of this chapter is one which has long been recognized and acted upon

Principle of estoppel long acted upon in India.

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[2] See also note to section 31, *ante*, p. 159.

[3] *Garth, C. J.*, in the *Ganges Manufacturing Co.* v. *Surajmall*, I. L. R. 5 Calc. 669, says. "Estoppels in the sense in which the term is used in

by the Courts in India. English writers sometimes classify these estoppels as estoppels by statement, estoppels by conduct, and estoppels by negligence; and this classification has been substantially followed in the above section :- "When one person has, by his (1) declaration, (2) act, or (3) omission,* intentionally caused, &c." The following are instances of estoppels by declaration or statement :—A person, who held a mortgage of certain property as security for a loan, represented to an intending purchaser of this property that he had no security over it, and induced him under that belief to buy. It was held that he could not subsequently put his mortgage in force as against that purchaser (*Manna Lal* v. *Chum Lall*, L. R. 1 I. A. 144 · 21 W. R. 21). A person wilfully made a false statement as to the value of certain horses, in order to induce a Railway Company to carry them at a lower rate of freight, and it was decided that he was thereby estopped from proving their real and greater value in an action against the Company for their loss (*M'Cance* v. *The London and North-Western Railway Company*, 7 H. & N. 447). Three estates, K, S, and P, were mortgaged by A to B as a security for a loan. Another person obtained a money-decree against A. B purchased this decree, and in execution thereof brought the village K to sale. At the sale he gave out to the world of buyers that he intended to burthen K with *the whole sum* due to him. The bidding was in consequence very low, and he purchased for Rs. 950; the real value of K being Rs. 20,000. B subsequently sued on the mortgage-bond to recover Rs. 12,212, principal and interest. It was held, that his purchase of K under the above circumstances precluded him from recovery in this suit (*Baijonath Sahai* v. *Dulhan Biswanath Koer*, 24 W. R. 83). A High Court in India, at the instance of the appellant's Counsel, confined its decision in a case to a single point upon an undertaking being given that no appeal should be preferred to the Privy Council. An appeal was preferred notwithstanding, but, the High Court having certified the undertaking upon the record, it was held by the Privy Council that the appellant had thereby precluded himself from appealing (*Amir Ali* v. *Inderjit Singh*, 14 Moo. I. A. 203 : 9 B. L. R. 460). The same principle was applied, where a judgment-debtor, being arrested in execution of a decree, filed a petition in Court, undertaking not to appeal against the decree on condition that the judgment-creditor released him and agreed to accept payment of the amount of the decree by instalments, and the judgment-creditor released

Estoppels by declaration.

English legal phraseology are matters of infinite variety, and are by no means confined to the subjects dealt with in Chapter VIII of The Evidence Act. A man may be estopped not only from giving particular evidence but from doing acts or relying upon particular arguments or contentions which the rules of equity and good conscience prevent his using against his opponent."

* The two first propositions in *Carr* v. *London and North-Western Railway Company* are included in *declaration*; the third in *act*; and the fourth in *omission*.

him and agreed accordingly (*Pratab Chandra Das* v. *Arathoon*, I. L. R. 8 Calc. 455 : 10 C. L. R. 443). So where the judgment-debtor agreed not to appeal in consideration of the judgment-creditor allowing him time to satisfy the decree (*Anant Das* v. *Ashburner & Co.*, I. L. R. 1 All. 267). See also *Rajmohan Gosain* v. *Gaur Mohan Gosain* (4 W. R. P. C. 46 : 8 Moo. I. A. 91), where it was said that a decree of an appellate Court obtained after a compromise and an agreement not to prosecute an appeal was an adjudication obtained, not only with great impropriety, but in effect with fraud.

In *Tulsimani Dasi* v. *Cornelius* (11 B. L. R. 144) it appeared that the Crown had by letter relinquished its claim to the assets of a bastard, the late husband of the defendant. It was held that the Crown would be estopped from asserting its claim to the property, and that therefore the defendant had a good title to the property, which could consequently be sold in execution of a decree. In *Goodrich* v. *Venkanna* (I. L. R. 2 Mad. 104) an agreement was entered into between the Commissioners for the town of V and the defendant farming the tolls of the town of V to the defendant for one year. The agreement was signed by the defendant, but was not executed under seal by the Commissioners. In a suit brought by the Commissioners for a portion of the sum due to them by the defendant, it was held that as the plaintiffs had fully performed all things to be performed by them, and both parties had acted under the agreement, though it was not formally executed by the Commissioners, and as the defendant had had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as ground of defence that there was no contract in point of law.

The following are cases in which it has been held that there has been no estoppel by declaration. In a suit to redeem a mortgage, one Mussamat Ladu, to avoid an objection taken as to want of parties, filed a petition disclaiming all interest in the estate. She had then only an expectant right to the estate, to which on the death of her son she became absolutely entitled. It was therefore held that she was not estopped from setting up her rights to the property in a subsequent suit brought against her for possession of it. Their Lordships of the Privy Council in their judgment pointed out that she had received no consideration for her disclaimer of all interest in the property in the redemption-suit, and that there had been no misrepresentation to the plaintiff in the suit for possession, who had not acted on any representation of hers or been induced to alter his possession thereby. The plaintiff, it was said, was acquainted with the actual facts of the case, just as Mussamat Ladu was. The real effect of the petition was that the plaintiff and Mussamat Ladu mutually agreed to represent what was not the fact for the purpose of enabling a certain suit to be carried on. Their Lordships were therefore of opinion that, even assuming that Mussamat Ladu by her petition did intend to convey to the plaintiff a present interest in the property which she supposed or assumed she had, there was no principle

Instances of no estoppel by declaration.

of law or justice by which that could prevent her from setting up her real right when that right had accrued; *Udey Kunwar* v. *Lada*, 13 Moo. I.A. 585. In *Abdul Rahim* v. *Madhavrav Apaji* (I. L. R. 14 Bom. 78), it appeared that it had been understood by the parties for some time that a certain mortgage had been converted into a sale, and that the property had passed to the defendant by purchase. But it was held that the mortgage still subsisted, and that mere admissions that it had been converted into a sale, even in depositions and pleadings, did not operate as estoppel, or prevent the mortgagor from redeeming his property. So, in *Yashwant Puttu Shenvi* v. *Radhabai* (I. L. R. 14 Bom. 312), in which one P had been described in a mortgage-bond as the adopted son of R, it was held that even treating this as an admission, it was not conclusive and did not operate as an estoppel.

As to estoppel by pleadings, see *ante*, p. 159.

Estoppels by conduct.

Estoppels by conduct are by far the most numerous, and very many instances are to be found in cases arising in India. When the real owner of immoveable property allowed another person (the *benami* purchaser) to hold himself out to the world as the actual proprietor and so to induce parties ignorant of the real state of things to lend money on the security of the property, he was held not to be entitled to any consideration from the Court, and was not permitted, on showing the actual state of the case, to recover the sale-proceeds of the property (when sold for arrears of revenue), which, in execution of a decree against the *benami* holder, the creditor had taken out of the Collector's Treasury (*Nanda Lal* v. *Tayler*, 1 Jur. N. S. 55: *Bama Sundari Debya* v. *Rashmani Debya*, 4 W. R. 36). Certain landed property was attached in execution as belonging to A, upon which B, his mother, and C, his brother's widow, came forward and claimed the property as their own, in consequence of which it was released from attachment. B and C were afterwards allowed to hold themselves out to the world as the real owners of the property, and they disposed of it by sale and otherwise, without objection from A, to persons who transferred to D. After A's death, his widow sold a portion of the property to E. In a suit by D for confirmation of his possession, it was held that D, as a vendee for valuable consideration deriving title from the ostensible owners of the property, was entitled to protection from the subsequent acts of the real owner and his heirs, both of whom were found to be parties to the fraud (*Rennie* v. *Ganga Narain Chaudhri*, 3 W. R. 10). A was the real owner of certain property, but suffered B to hold *benami* and to appear to the world as the real owner. B stood by, while C acting as owner made a mortgage of the property. B also became a witness to the mortgage-deed. A afterwards sued to recover the property, alleging that B had perpetrated a fraud on him. He was held bound by B's conduct, as his own acts had led to the fraud, inasmuch as he had allowed B to be the ostensible owner (*Brajonath Ghosh* v. *Kailas Chandra Banarji*, 9 W. R. 593: see also *Nidhi Singh* v. *Bissonath Das*, 24 W. R. 79; and *Surub Narain Chaudhri* v. *Sheo Gobind Panday*, 11 B. L. R. App. 29).

Benami transactions.

Where property has been transferred or otherwise disposed of *benami* in fraud of creditors, the real owner or his representatives, private purchasers as well as heirs, will not be permitted to come into Court alleging the fraud and succeed in having the transfer or other disposition of the property set aside :—*Lakhi Naram Chakravartti* v. *Taramani Dasi*, 3 W. R. 92 (Suit to set aside a *mukarrari* lease created *benami* in fraud of creditors). *Parikhit Sahu* v. *Radha Kissen Sahu*, 3 W. R. 221 (*Benami* conveyance with same object): *Bhawani Persad* v. *Ahidan*, 5 W. R. 177 (*Benami* transfer to wife) *Raushan Bibi* v. *Karim Baksh*, 4 W. R. 12 (Suit by heirs to obtain property transferred to wife for fraudulent purpose) *Rattan Dayi* v. *Rai Gauri Sankar*, 4 W. R. 72. But see *Mahadaji Gopal Ballekar* v. *Vithal Ballal*, I. L. R 7 Bom. 78, where the transferrees had accepted repayment of Rs. 750 as mortgagees. B, a *darpatnidar*, defeated a suit for rent brought by A, his *patnidar*, who was also *zamindar*, by pleading that he had transferred his *darpatni* interest to his wife and son. A then sued the wife and son, obtained a decree, brought the *darpatni* interest to sale in execution, and purchased it himself. He then as *darpatnidar* sued the tenant under him for rent, whereupon C intervened, claiming title to the *darpatni* under a mortgage from B made after the dismissal of A's suit against B, alleging that B's wife and son were mere *benamidars*, and further stating that he had completed his title by a purchase in execution of a decree obtained on his mortgage. It was held that C, who would admittedly have been estopped as mortgagee by the plea of his mortgagor was in no better position by reason of his purchase in execution (*Poreshnath Mukharji* v *Anathnath Deb*. L. R. 9 I. A. 147: I. L. R. 4 Calc. 783 · I. L. R. 9 Calc. 265). A, a trustee of land, alleging it to be his own property, mortgaged it to a person, who took the mortgage in good faith, for valuable consideration without notice of the trust. The mortgagee subsequently brought the land to sale in execution of a decree obtained on the mortgage ; and it was purchased by B. A thereupon sued B to recover the land on the ground that it was trust property, and he had no power to transfer it. None of the beneficiaries under the trust were parties to this suit. It was held that A was estopped from recovering possession of the land (*Gulzar Ali* v. *Fida Ali*, I. L R. 6 All. 24). In *Ram Persad* v. *Shiva Persad* (1 N.W. P. Rep. 71) fictitious sales of certain property had been executed in favour of persons residing in foreign territory in order to evade process for the recovery of arrears of revenue. The Revenue authorities assumed the management of the property, farmed it, paid off all arrears, and restored possession to the real owners. In a suit by the vendee under the fictitious sale to recover possession, it was held that the maxim '*In pari delicto potior est conditio possidentis et defendentis*' applied, although the real owner after passing the property by a fictitious sale, could not come into Court to recover it ; and that the case was also within the rule that relief will be granted where public policy will be promoted, the public policy here being the policy which Government through the Revenue authorities had decided to be best for the estate. Where land or other immoveable property has been sold

in execution of a decree (see section 260 of Act VIII of 1859 and section 317 of Act XIV of 1882) or for arrears of Government revenue (see section of Act XI of 1859 and section 184 of Act XIX of 1873), the law will not allow a stranger to claim the property on the ground that the certified purchaser merely purchased *benami* on his account; and any suit brought on such an allegation must be dismissed with costs. When a husband during his lifetime in every way both publicly and privately, whenever called upon to make any representation on the subject, always represented that certain immoveable property was his wife's, the purchasers from her could not after his death be equitably turned out of the property in favour of his heirs. The heirs would after his death be as much bound by the father's misrepresentations as he would have been during his life (*Lachman Chandra Gir Gossain* v. *Kali Charn Singh*, 19 W. R. 292). This case was followed in *Chandra Kumar* v. *Harbans Sahai*, I. L. R. 16 Calc. 137, in which the facts were similar. Another case to the same effect is *Krishnaji Mahadev* v. *Moro Mahadev*, I. L. R. 15 Bom. 32. In a suit to establish the validity of the adoption of the plaintiff by the defendant, when it was shown that the defendant had taken the plaintiff in adoption, brought him up and married him as the adopted son of her husband, and had put herself forward as his mother, it was held she was estopped from denying the validity of the adoption: *Ravji Venayakrav Jagannath Shankar Sett* v. *Lakshmibai*, I. L. R. 11 Bom. 381: see also *Kannamal* v. *Virasami*, I. L. R. 15 Mad. 486.

The following cases afford other instances of estoppel by conduct: *Bhagwan Das* v. *Apuch Singh*, 10 W. R. 185 (Real owner, placing indicia of ownership in the hands of another, bound by alienation made by the latter, unless he can show that alienation was made without his acquiescence and that alienee took with notice of such fact): *Boileau* v. *Miller*, 10 C. L. R. 591 (True owner leaving his goods in the possession, order or disposition of another person under circumstances enabling the latter by means of them to obtain false credit—section 23 of The Insolvent Act, 11 and 12 Vict., cap. 21): *Beni Persad* v. *Man Singh*, 8 W. R. 67. In *Raj Kumar Kundu* v. *McQueen* (11 B. L. R. 53) the Privy Council said—"It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it." A, having fabricated a deed of sale to himself of certain property of his brother, was thereby enabled to appear as owner of the property and deceive B to whom he conveyed it for full consideration. The deed-of-sale

Other cases of estoppel by conduct.

to A was set aside as fraudulent. A on the death of his brother succeeded to his rights by inheritance. A's heir subsequently sued to recover the property conveyed to B; but it was held that A's heir could not do what A himself would not be allowed to do; that A claiming as heir to his brother could not set up his own fraud and forgery against B, whom he had deceived thereby; and that the case came within the well-known rule of law that where a person by his own solemn and deliberate act wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he is conclusively bound by the representation so made and will never be allowed to contradict it to the prejudice of the other (*Amir Ali* v. *Syef Ali*, 5 W. R. 289: see also *Radhakissen* v. *Sharifunnissa*, W. R. (1864,) 11). A decree was passed for the payment of a certain sum of money without interest. Afterwards the decree-holder and the judgment-debtor filed a *kistbandi*, agreeing that the amount of the decree should be paid by instalments with interest, and the judgment-debtor by his conduct for several years treated this *kistbandi* as if it were the decree. It was held that he could not afterwards object that the *kistbandi* could not be executed as a decree and that a fresh suit must be brought thereupon (*Dinonath Sen* v. *Guru Charan Pal*, 14 B. L. R. 287: 21 W. R. 310: see also *Sheo Ghulam Lal* v. *Beni Prasad*, I. L. R. 5 Calc. 27). The notification of property for sale in execution of a decree stated the Government revenue to be Rs. 3,146 instead of Rs. 8,146. The judgment-debtor thus applied to the Court for a postponement of the sale—"Under such circumstances it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" It was held that this petition amounted to an admission that there was no mistake or irregularity likely to mislead, and that the judgment-debtor could not afterwards take advantage of the above mistake in order to have the sale set aside (*Giridhari Singh* v. *Hurdeo Narain Singh*, L. R. 3 I. A. 230). From this case of *Giridhari Singh* v. *Hurdeo Narain Singh* was distinguished *Mahatab Deo* v. *Lilanand Singh*, I. L. R. 7 Calc. 613: 9 C. L. R. 398), where there was a mere petition for a month's time (which was refused), such petition containing no words capable of being construed as an admission that there had been no mistake or irregularity. In the case of *Mina Kunwari* v. *Jagat Setani* (L. R. 10 I. A. 119: I. L. R. 10 Calc. 196: 13 C. L. R. 385) certain petitions asking for time alleged to have been put in by the judgment-debtor, were relied upon as precluding him from contending that the execution of the decree was barred by limitation. Their Lordships of the Privy Council said:—"They contain no admission that the decree could be legally executed against the respondent, and are not within the description of an estoppel given in *The Indian Evidence Act*, 1872, section 115 and following sections." When parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards in special appeal question it and recede from their tacit admission (*Mahima Chandra Rai Chaudhri* v. *Ram Kishor Acharji Chaudhri*, 15 B. L. R. 155: 23 W. R. 174: *Devaji Gayaji* v. *Goddabhai Godebhai*, 2 Bom. H. C. Rep. 28: *Harihar Mukharji* v. *Raj Kissen*

Mukharji, 23 W. R. 251: *Kanailal Khan* v. *Shoshi Bhusan Biswas*, 8 C. L. R. 117: *Gopal Sahu Deo* v. *Jairam Tewari*, 9 C. L. R. 402 (No objection for ten years to the allowance of interest in accounts in execution). A, a decree holder, having attached lands belonging to his judgment-debtor, entered by mistake one parcel under two numbers as two parcels in the sale-proclamation. This parcel was in consequence twice put up to sale and was knocked down, first to A himself and afterwards to B. In a suit by B to restrain A from entering on the land, it was held that A was estopped by his own mistake from setting up a title against B (*Tinnapa Chetti* v. *Muru gappa Chetti*, I. L. R. 7 Mad. 107). Where a defendant made no objection at the time to the purchaser of the plaintiff's interest in the suit substituting his name on the record for that of the plaintiff, he was not afterwards allowed to contend that the suit had thereby abated (*Bir Chandra Rai Mahapatar* v. *Bansi Dhar Rai Mahapatar*, 3 B. L. R. A. C. 214). A purchased certain property at a sheriff's sale and again conveyed to B. Neither A nor B made any attempt for eleven years to assert their right to the property, or gave any intimation of their purchase to C, who was in possession. C sold to D without any remonstrance from them either before or after the sale. In a suit by the assignee of B to obtain possession of the property, it was held that A and B, having allowed C to retain all the *indicia* of ownership, having wilfully and designedly kept him in ignorance of their rights, and having looked on in silence while he was innocently selling to a purchaser for valuable consideration, were estopped by this conduct from asserting their rights against that purchaser, and that their assignee was in the same position as they were (*Mohesh Chandra Chatarji* v. *Issar Chandra Chatarji*, 1 Jur. N. S. 266). A's wife by a *kabala* sold a portion of certain property to B. and agreed if she sold the rest to sell it to B. A consented to and was a witness of the *kabala*. After the death of his wife, A sold the rest of the property to another person. In a suit by B to set aside this sale and enforce his right of pre emption, it was held that A was bound by the agreement contained in the *kabala* (*Kalinath Rai* v. *Bhubanesari Dasi*, Sev. Rep. July—Dec. 1864, p. 207). An offer of sale was made to a person having a right of pre-emption, but he refused it and consented to a sale to a stranger. It was held that he could not afterwards set up his right of pre-emption (*Braja Kishor Sarma* v. *Kirti Chandra Sarma*, 7 B. L. R. 19). A Hindu mother sold a portion of the property during the minority of her son. Eleven months after attaining his majority, this son signed on behalf of his mother a written defence in a suit brought by the purchaser to obtain possession of the property and in which she was a defendant *pro formâ*, and he took an active share in conducting her defence. It was held that he was estopped by this conduct, when he subsequently sued to set aside the sale as made without necessity therefor[a] (*Kebal*

[a] As to the duty of a Hindu minor on coming of age to make himself acquainted with what was done during his minority by the managing member and the effect of his silent acquiescence for several years, see *Gopal Narain Mazumdar* v. *Madomati Gupti*, 14 B. L. R. 32.

Krishta Das v. *Ram Kumar Saha*, 9 W. R. 571: see also *Sia Dasi* v. *Gur Sahai*, I. L. R. 3 All. 362; and distinguish *Ram Chandra Poddar* v. *Hari Das Sen*, I. L. R. 9 Calc. 463). An adopted son sued his adopted father's brother for partition of the family property. The latter disputed the adoption, but it was decided that he was estopped from doing so as he had actively participated in the adoption, had by many acts signified to his brother and the plaintiff his complete acquiescence therein, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, had allowed his brother to die in the belief that the adoption was valid, and finally had concurred in the performance by the plaintiff of the funeral ceremonies of the deceased (*Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate*, 11 Bom. H. C. Rep. 190). If a man grant a lease of land, in which he has no legal interest, he cannot afterwards deny the validity of this lease if he come to have an interest in the land, and the lease will take effect accordingly. If the lessor, at the time of making the lease, have an interest, it is a rule of English Common Law that such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant. Equity would, however, more especially if the lease were made for a valuable consideration, oblige the lessor to make good the terms out of the interest he had acquired.[6] Where a person having a limited interest, namely, a sub-lease, granted a perpetual lease on consideration of Rs. 2,000, and afterwards acquired the proprietary right, he was held to be estopped from disputing the perpetual lease (*Kuru Chaubi* v. *Janki Persad*, 1 N.-W. P. Rep. 165). Where a person, having a mortgage of certain property, assisted the owner thereof in borrowing money on the security of the same property, as if it were unincumbered, and, neither during the negotiation nor at the time of paying over the money so borrowed, communicated the fact of his own lien, it was held that by such conduct he lost the priority which his mortgage otherwise would have had, and that his claims must be postponed to those of the subsequent mortgage[7] (*Sita Ram* v. *Kissen Das*, alias *Kishnarain*, 5 N.-W. P. Rep. 402). With this case compare *Salamat Ali* v. *Budh Sing*, I. L. R. 1 All. 303. The master of a vessel signed a bill-of-lading which stated that four casks were marked with the word "Calcutta" as the port of destination. In an action for damages for landing the casks at Colombo, it was held that the master was estopped from saying that they were not marked with the word "Calcutta" (*Madhab Chandra De* v. *Law*, 13 B. L. R. 394). When the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark and that it was open to the defendant to adopt it as his own and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market, it was held that the plaintiffs

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[6] See Williams *on the Law of Real Property*, 6th edn., p. 338; Story's *Equity Jurisprudence*, § 387, and following paras.; and *Amir Ali* v. *Hira Singh*, 20 W. R. 21.

[7] See Story's *Equity Jurisprudence*, § 390.

were estopped from denying the defendant's right to use the trade-mark (*Lavergne* v. *Hooper*, I. L. R 8 Mad. 149). A zamindar who accepts rent from the vendees of his former tenants accepts the vendees as his tenants, and is estopped by his conduct from treating them as trespassers (*Durga* v. *Jhinguri*, I L. R 7 All 511, 878). A contracted to buy from B and Co. 180,000 gunny bags for cash on delivery Subsequently, C agreed with A to advance Rs. 15,000 against 87,500 bags. B and Co gave delivery orders to A, although the goods remained unpaid for. A gave a delivery order for 87,500 bags to C, and on this order the agent of B and Co, at the request of A, wrote the words "The bearer of this will personally take delivery of each lot as required." The order was given to C and on the faith of it C advanced Rs. 15,000 to A. B and Co. then delivered 50,000 bags to C, which were sold for Rs 10,000, but they refused to deliver the remaining 37,000 bags, claiming to hold them for the unpaid price, which A had failed to pay. C accordingly sued B and Co for the sum of Rs 5,000 by which he was out of pocket It was held that though there had been no actual appropriation of the goods to A, the original purchaser, yet, as B and Co. had consented to the transfer of the goods to C, and as C had thereby been induced to advance Rs. 15,000, B and Co were estopped from denying that they held the goods at the disposal of A (*Ganges Manufacturing Co.* v. *Suraj Mall*, I L. R. 5 Calc. 669. 5 C. L R. 533).

The Court of the Agent for Sardars at Poona made a decree in favour of A against B. A sold this decree to C, who applied to the Court of the Subordinate Judge of K to execute it against D, the grandson of B. Rs. 121 were realized in execution from D, who appealed to the High Court.

Denial of jurisdiction estopped

It was held on this appeal that the Subordinate Judge of K had no jurisdiction to execute the decree. D then sought a refund of the Rs 121 levied in execution. It was held that C, who had put the Subordinate Judge's Court in motion and thus submitted himself to its jurisdiction, was by his own act estopped from saying that the same Court had not jurisdiction to retrace its steps, and to replace the parties in the position which they occupied before the irregular execution was had (*Govind Vaman* v. *Sakharam Ramchandra*, I L. R. 3 Bom. 42). In a partition suit a commissioner was appointed under the provisions of section 398 of the Code of Civil Procedure to effect the partition. He made his report, which was objected to by the defendant on the merits, but was ultimately confirmed. The defendant, who had acquiesced in the proceedings before the commissioner, then objected on appeal to the District Judge that the appointment of the commissioner was irregular. It was held that, having acquiesced in the proceedings, he could not at that stage take this objection (*Gyan Chandra Sen* v. *Durga Charan Sen*, I. L R. 7 Calc. 318).

The law of estoppel by conduct has recently been expounded by the Privy Council in the case of *Sarat Chandra De* v. *Gopal Chandra Laha*, L R. 19 I. A. 203 I L. R. 20 Calc. 296. In this case one Ahmed Hossein

Recent exposition of law of estoppel by Privy Council

sued for the recovery of his share in the property of his father Umed Ali Shah. The defendants pleaded that the property had been mortgaged to their predecessors in title by Arju Bibi, the wife of Umed Ali Shah, who was the true owner of the property, having acquired right to it under a *hiba* executed in her favour by her husband—that their predecessors in title had sued on their mortgage, and that the property had been put up to sale and that they, the defendants, had purchased the property at this sale. Further, they pleaded that the plaintiff, Ahmed Hossein, having represented his mother, Arju Bibi, in the mortgage transaction, was thereby estopped from claiming the property as his own. Their Lordships of the Privy Council found that Ahmed Hossein with another acted on behalf of his mother under a power of attorney authorizing him to do so. He signed the mortgage on her behalf and in her name, and he and the other person with whom he acted received the money advanced by Kalimudin, the mortgagee. In these circumstances it was held that Ahmed Hossein was estopped from recovering his share of the property.

"Their Lordships are very clearly of opinion," it was said, "that these actings on the part of Ahmed create an estoppel against him, or any one claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the *hiba* in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal objections, Ahmed as the person entitled to challenge the deed, waived his right to do so and consented for his interest to represent and to hold the *hiba* as valid and consequently as giving a legal right to Arju Bibi as the proprieto, to grant the mortgage. There was a distinct representation by Ahmed professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordship's opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was there induced to lend the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make inquiry into the validity of such a title as Arju Bibi, the borrower, here possessed, and the obligation applies with great force in this case, in which the *hiba* was granted without consideration, and, as the least inquiry would have shown, without any possession having followed on it. But inquiry, or indeed any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the *hiba* in her favour was made quite unnecessary by the representation and conduct of Ahmed, who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the *hiba*, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

"In this state of the facts the terms of section 115 of The Evidence Act directly apply to the case, for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibi, as proprietor under the *hiba*, was entitled to grant the mortgage, neither he, nor his representative, the plaintiff, can be allowed to deny the truth of what was thereby represented, believed, and acted on.

"From the terms of the judgment of the District Judge it rather appears that he might have sustained the plea of estoppel but for certain considerations which are thus stated in different parts of his judgment. He says, 'There is also nothing to show that Ahmed Hossein was not under a *bonâ fide* mistake when he supported the *hiba*. He knew nothing of its execution, and was a minor when his father died. Until disabused by the High Court decision,[8] he may have honestly believed that the *hiba* was genuine. . . . . There is nothing to show that Ahmed Hossein committed any fraud or contemplated committing any.'

"The District Judge further indicates that even if the plea of estoppel might have been sustained in other circumstances, yet the purchasers would be open to the objection that they cannot avail themselves of the plea as being '*bonâ fide* purchasers for value and without notice,' because before the purchase was made under the mortgage sale certain judicial proceedings before the High Court (referred to in a passage in the judgment just quoted) had been taken by or on behalf of Pakjan, a minor son of Ahmed Ali, in which it was determined that the *hiba* in favour of Arju Bibi was invalid, of which proceedings the purchasers were said to have been cognizant. The High Court in the closing part of the judgment under appeal also say: 'Under these circumstances we cannot hold that the Additional District Judge, either in determining as he has done, that no estoppel was created, or in holding as he has done, that the defendants do not occupy the position of *bonâ fide* purchasers without notice, was wrong; and this absolves us from considering the further question which we might perhaps have otherwise found it necessary to determine, *viz.*, whether if Ahmed and Rahimunnissa[9] were estopped from disputing the *hiba*, that estoppel would have been binding on the plaintiff, in the absence of proof or knowledge on his part of the circumstances that gave rise to it.'"

With reference to the views indicated in these passages of the judgments now under review, their Lordships think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser under the mortgage sale, though it clearly appeared that Ahmed, when he acted as he did in the mortgage transaction, was under the belief that the *hiba* was a valid deed which he could not set aside; nor is it of any moment that he neither contemplated committing any fraud,

There may be estoppel without fraud or fraudulent intention.

[8] This decision was passed in the proceedings referred to in the next para.

[9] Rahimunnissa was the sister of Ahmed. With regard to her share of the property their Lordships of the Privy Council held with the Lower Appellate Courts that there was no estoppel.

nor, in fact, committed any fraud by his acts or representations. And their Lordships must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which in default of payment of the money lent he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the *hiba*, and that it had been originally invalid.

In regard to the first of these points, the section of The Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the Statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned Counsel who argued the present case on either side were agreed that the terms of The Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell), with the full concurrence of Lord Kingsdown, in the case of *Cairncross* v. *Lorimer*, 1860, III Macqueen's House of Lords Cases, p. 829:—

"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he

had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he or others taking title from him, seek to challenge after a considerable interval of time.

There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to, or in the leading authorities of *Pickard* v. *Sears*, 6 A. and E. 469; *Freeman* v. *Cooke*, 2 Ex. 654; and *Cornish* v. *Abington*, 4 H. and N. 549. In the more recent case of *Carr* v. *London and North-Western Railway Company* (1875), L. R. 10 C. P. 316, in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that no doubt in certain cases where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently, but, as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accordingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton Laing & Co.* v. *Lafone* (1887), L. R. 19 Q. B. D. 68, by a unanimous judgment of Lord Esher and Lords Justices Fry and Lopez. In that case Lord Esher said:—"An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel." To this statement it appears to their Lordships it may be added that there may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterized as "misrepresentations," as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the *hiba* in favour of Arju Bibi was valid in itself, or at all events that

be, as the party having an interest to challenge it, had elected to consent to its being treated as valid.

Reference has already been made to certain Indian cases which were cited nd founded on in the course of the argument. These were the cases of *Gdnya Sahai* v. *Hira Singh* (1880), in the High Court of Judicature at Allahabad, I. L. R. 2 All. 809, and *Vishnu* v. *Krishnan* (1883), in the High Court at Madras, I. L. R. 7 Mad. 3. In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressly said . "There must be deception, and change of conduct in consequence." The latter case was one in which an adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultra vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the adopting father, which had induced the belief on the part of the plaintiff that the adoption was valid, and in consequence of which the adopted son had abstained from claiming share in the inheritance of his natural family. In the end the adoption, which was that of a sister's son, was held, after a proof of the customary law of Malabar, to have been valid; but before allowing the proof the Court decided that the case of estoppel failed.

It would be most difficult to reconcile this decision with that of the case of *Luchmun Chunder and another* v. *Kalli Churn and another*, (19 W.R. 292; see *ante*, p. 543) already referred to, and the views of this Committee as there expressed; and their Lordships would also have great difficulty in holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognized, constitute a representation in law only and not of fact. But apart from this, the Court seems to have taken the view that in order to create estoppel, the representations founded on must have been made with an intention to deceive; and an opinion was indicated that the law of estoppel under The Indian Evidence Act in some respects differed from the law of England. It was there said (I. L. R. 7 Mad. 8): "The term 'intentionally' was, no doubt, adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard* v. *Sears*, and explained in *Freeman* v. *Cooke* and *Cornish* v. *Abington*, it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts." Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by there substituting the word "intentionally" in the rule established for the word "wilfully" which had been previously used, it seems to their Lordships that the term "intentionally" was used in The Evidence Act (1872) for the purpose of declaring the law in India to be precisely that of the law of England. Baron Parke, in the case of *Freeman* v. *Cooke* (2 Ex. 654) in effect stated that the term "wilfully" used in the yrevious case of Pickard was really equivalent to

"intentionally," in these words: "By the term '*wilfully*' . . . . . we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the Statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington* and the later cases.

It is unnecessary to quote the passages (pp. 8 and 9 of the Report) in the case of *Vishnu* v. *Krishnan*, indicating that in the opinion of the High Court it was necessary to prove an intention to deceive in order to make a case of estoppel. Their Lordships have already said enough to make it clear that they differ from the views to that effect expressed in that case, and in the case of *Ganga Sahai* v. *Hira Singh*.

As already stated, the plaintiff further maintained that the appellants could not avail themselves of the plea of estoppel against him because before their predecessors made the purchase under the mortgage sale they were aware that it had been held by the High Court in another suit that the *hiba* which was the foundation of the title under which they purchased was invalid; but as already explained, their Lordships have no difficulty in repelling this contention. It may be true, and in any case it may be assumed to be true, that the appellants' predecessors in title knew of the decision referred to. But it is equally true that whatever might have been held as to the invalidity of the *hiba* in a proceeding at the instance of Pakjan, Ahmed, or any one claiming in his right, was precluded by Ahmed's acts and representations from maintaining the invalidity of the *hiba*, or the mortgage granted By his mother so far as regards his share of the property. In any question with Ahmed or his representatives, Kalimuddin had obtained a valid mortgage, and as he had himself a valid title, so he could give a good title to a purchaser under a mortgage sale, whatever might be the state of knowledge of the person purchasing. Their Lordships therefore are clearly of opinion that the appellants are not precluded from maintaining, as they do successfully, that the plea of estoppel is good against Ahmed, and consequently good against the plaintiff, in so far as regards the share of the property which Ahmed might have claimed as succession."

Some statutory provisions creating estoppels.

Under the provisions of section 237 of The Indian Contract Act, IX of 1872, when an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the latter is bound, if he has by his words or his conduct induced such third persons to

believe that such acts and obligations were within the scope of the agent's authority (see also section 238). Section 245 of the same Act enacts that a person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm. Section 246 further provides that any one consenting to allow himself to be represented as a partner, is liable as such to third persons who on the faith thereof give credit to the partnership. See also section 464, *post*.

As to estoppels by omission or negligence, the remark of Mr. Justice Blackburn (*ante*, p. 538) may well be borne in mind. A person left with his wife cheques ready signed, but not having the amounts filled in. She filled up one so imperfectly as to enable the bearer to alter £50 into £350; and it was decided that the husband was estopped from setting up against the banker, who had acted with ordinary caution in paying the cheque in the usual course of business, that his agent had only drawn the cheque for the smaller sum, inasmuch as it was his negligence, through his agent, that enabled the fraudulent holder to cheat the banker (*Young* v. *Grote*, 4 Bing. 254 : 12 J. B. Moore 484). A claimed under a mortgage, which was neither registered, nor accompanied by possession. B claimed under a later mortgage, which was registered and accompanied by possession, and had no notice of A's mortgage. A sued the mortgagor for a sum of money unconnected with the mortgage, obtained a decree, and in execution thereof brought the mortgaged property to sale, but at the time of the sale gave no notice of his mortgage. B purchased the property. A subsequently sued to enforce his mortgage lien upon the property, but he was held to be estopped from doing so, as he had omitted to give notice of his mortgage to B, when

Estoppels by omission.

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[1] As to estoppel by conduct see also the following cases :—*Hardeo Baksh* v. *Jawahir Singh*, L. R. 6 I. A. 161 (Oudh *talukdar* held to have consented by his acts and declarations to hold the estate in trust for the joint family): *Ram Dial* v. *Mahtab Singh*, I. L. R. 3 All. 701 : *Sera Ram* v. *Ali Baksh*, I. L. R. 3 All. 805 (Privy in title) : *Purmanundass Jibandas* v. *Venayekrao Wasudeo*, 12 C. L. R. 92 : *Sarkies* v. *Prasannomayi Dasi*, I. L. R. 6 Calc. 794 (Recital in deed as against purchaser). As to a mortgagee, who has brought the mortgaged property to sale in execution of a decree made upon his mortgage, being estopped from saying that his own interest therein as well as that of the mortgagor did not pass by the sale, so as to enable the purchaser to take free of incumbrance, see *Khevraj Jasrup* v. *Lingana*, I. L. R. 5 Bom. 3 : *Shashgiri Shanbhog* v. *Salvador Vas*, I. L. R. 5 Bom. 5 : *Abdúla Saba* v. *Abdúla*, I. L. R. 5 Bom 8 : *Narsidas Jitram* v. *Joglekar*, I. L. R. 4 Bom. 57 : *Mumtazúdin Mahomed* v. *Rajkumar Das*, 14 B. L. R. 408 : 23 W. R. 187 : *Bhagobati Dasi* v. *Shamacharan Basu*, I. L. R. 1 Calc. 337. *Ramá Naikan* v. *Subbaraya Mudali*, 7 Mad. H. C. Rep. 229 : *Ramanath Das* v. *Baloram Phukan*, I. L. R. 7 Calc. 677 : 9 C. L. R. 233 : *Agrawal Singh* v. *Faujdar Singh*, P. C. 8 C. L. R. 346 (Conduct, though not amounting to an estoppel, held sufficient to throw the burden of proof on the other side) : *Makundi Kuar* v. *Balkishen Das*, I. L. R. 3 All. 328. (on account stated balance found due to plaintiff, consisting of original debt and interest at 6 per cent per annum and defendants therefore held estopped from disputing plaintiff's demand for interest at that rate.– *Bishen Chand* v. *Rajendra Kishor Singh*, I. L. R. 5 All. 302 : (utterers of a forged hundi, knowing it to be forged, estopped from setting up the forgery of the hundi as a bar to suit.)

bidding for the property (*Tukarám Bin Atmaram* v. *Ram Chandra Bin Budharam*, I. L. R. 1 Bom. 314). A, in execution of a money-decree, brought to sale the right, title, and interest of B in certain property; but he gave no notice that this property had been mortgaged to him, and that his mortgage-lien was in existence at the time of the sale. C became the purchaser. A afterwards obtained a decree on the mortgage-bond and assigned this decree, in execution of which the assignee attached the same property. C, having claimed without success under section 246 of Act VIII of 1859, brought a regular suit to establish his absolute title. It was held that, as A had suppressed the fact of his charge on the property and so had induced C to purchase, he was precluded from afterwards setting up the mortgage-lien, and that A's assignee could not do what A himself would not be allowed to do (*Dullab Sarkar* v. *Krishna Kumar Bakshi*, 3 B. L. R. A. C. 407.) See also *Hari* v. *Lakshman*, I. L. R. 5 Bom. 314; and *Agar Chand Guman Chand* v. *Rakhma Hanmant*, I. L. R. 12 Bom. 678, in which latter case it was pointed out that the rule that registration of a mortgage amounts to notice to all subsequent purchasers of the same property does not apply to a case where there has been a fraudulent concealment by a judgment creditor of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. Other cases are those of *Jaganatha* v. *Gangi Reddi*, I. L. R. 15 Mad. 305; and *Kasturi* v. *Venkatachalapathi*, I. L. R. 15 Mad. 412, the facts of which are similar to those of *Dullab Sarkar* v. *Krishna Kumar Bakshi*. The holder of a service tenure died leaving a brother who was then out of India. Shortly before his death he made an invalid assignment of his holding to a third person who performed the service and granted pattas of the land. The holding was resumable on failure of the service. The brother of the late service tenure-holder returned after three years and obtained registration of his tenure; he then sued to enforce acceptance of pattas tendered by him, but it was held that his conduct justified the tenant's belief that the assignee was authorized to collect rent from them—*Khadar* v. *Subramanya*, I. L. R. 11 Mad. 12. As to the estoppel of a legal representative, see the case of *Natha Hari* v. *Jamni*, 8 Bom. H. C. Rep. A. C. 37, in which it was ruled that the legal representative of a deceased person, though not a party to the suit, would be bound by an execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he had acquired a good title.

Cases in which no estoppel.

It will be useful to notice some cases in which there was held to be no estoppel. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his own detriment (*Girish Chandra Ghosh* v. *Iswar Chandra Mukharji*, 3 B. L. R. A. C., 337. 12 W. R. 226; *Karali Charan Banarji* v. *Mahtab Chandra*, Sev. Rep. July—December 1864, p. 29). A Hindu widow, who had inherited as heiress of her husband, sold a portion of the property by an instrument

which recited that the sale was made for necessary purposes. This instrument was witnessed by the person who was *at that time* the next (reversionary) heir to the property, and who afterwards died. In a suit to set aside the sale brought by the heir next after him, and who was not born at the time that the instrument was executed, it was held that the assent of the first heir, signified by his witnessing the conveyance, was not in law conclusive on the question of necessity, though it was strong evidence of good faith (*Madhab Chandra Hajrah* v. *Gobind Chandra Banarji*, 9 W. R. 350). A Hindu father adopted a son, and afterwards, while this first adopted son was alive, adopted a second son, such second adoption being, however, invalid by Hindú law. The first adopted son, after he came of age, acquiesced in a division of the property made by the father between his two adopted sons. It was held that, although such first adopted son was bound by this acquiescence with regard to the property of which the father had the power of disposing by an act *inter vivos* without his consent, he was not bound thereby as to the disposition of the *ancestral* property (*Rangama* v. *Atchama*, 4 Moo. I. A. 1). The service of notice of foreclosure on the occupant of mortgaged property (a person who claimed as purchaser from the mortgagor, but who afterwards failed to establish this title) was held not to estop the mortgagee from disputing such occupant's title to redeem (*Prannath Rai Chaudhri* v. *Rukia Begam*, 7 Moo. I. A. 359). A Hindú died leaving a minor son A, three daughters, B, C, and D, and a widow E. After his death and that of A during minority, E adopted a son under an alleged power conferred by will. B subsequently bore a son, and having brought a suit to establish this son's rights as heir to the property and to set aside the adoption, it was contended that she had known of and had assented to the adoption. It was held that, even if it were so, her conduct in this respect could not prejudice the rights of her son, who was at the time unborn (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. 145). A Muhammedan took out probate of a will, and it was held that this did not estop his heirs from disputing the will (*Muhammed Medan* v. *Khadiz unissa*, alias *Khuki*, 2 W. R. 181). A judgment-debtor made a *benami* purchase of the decree obtained against himself and other judgment-debtors and took out execution, which was submitted to by the other judgment-debtors. It was held that their having so submitted did not prevent them from objecting, when a further application for execution was made, that a co-judgment-debtor being the real purchaser was not entitled to execute the decree[2] (*Abhia Charan Rai Chaudhri* v. *Nobin Chandra Rai Chaudhri*, 23 W. R. 95). In a suit for possession of land against a person who was really a trespasser, it was held by a Full Bench that, by setting up in his written statement a false case of being a tenant, he did not preclude himself from also raising the defence of limitation (*Dinomani Debi* v. *Durga Persad Mazumdar*, 12 B. L. R. 271: 21 W. R. 70: *Maidin Saiba* v. *Nagapa*, I. L. R. 7 Bom. 96). When a person claimed as his own property attached in execution of a

[2] In accordance with the Full Bench decision in *Sarup Chandra Hazra* v. *Trailokhnath Rai*, 9 W. R. 230.

decree against another person, and, his claim being rejected without inquiry, purchased the property at the sale, it was held that his so purchasing did not estop him from asserting as against a mortgagee prior to the sale that the property was his independently of the sale (*Hanuman Dat* v. *Asadula*, 7 N.-W. P. Rep. 145). It has been held that a proposition of law is not a "thing" within the meaning of the section, and this expression refers to a belief in a fact (*Rajnarain Basu* v. *The Universal Life Assurance Co.*, I. L. R. 7 Calc. 594 · 10 C. L. R. 569). A adopted B in the belief that the adoption was valid in law. In consequence of such adoption and the subsequent conduct of A, B was induced to abstain from claiming a share in the inheritance of his natural family. It was held that a person claiming through A was not estopped from impugning the validity of the adoption (*Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri*, I. L. R. 7 Mad. 3).[8] A purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of section 115 of The Evidence Act (*Prabhu Lal* v. *Mylne*, I. L. R. 14 Calc. 401 : *Bashi Chandra Sen* v. *Inayet Ali*, I. L. R. 20 Calc. 236 ; and see *ante*, pp. 131-133). H, being born deaf and dumb, was, under Hindú Law, incapable of inheriting his father's estate. In a certain arbitration proceeding to which the defendant G was, but H was not, a party, it was held that H was an heir to his father's estate. G, after this award was made, expressed to it his assent in writing. H subsequently sued G for his father's estate, and it was held that as H was not a party to the arbitration proceedings, G was not estopped by his assent to the award from questioning H's right of inheritance (*Ganga Sahai* v. *Hira Singh*, I. L. R. 2 All. 809 6 All. 322 · L. R. 11 I. A. 20). One Shidápa Bapu died indebted to the defendant Malkhana. On his death his widow Sagawa became his heir. In 1878 Malkhana brought a suit to enforce payment of the debt due by the deceased, Shidápa Bapu, and he made Baslingawa, the another of Shidápa, defendant in the suit, omitting Sagawa altogether. He obtained an *ex-parte* decree and in execution the house of Shidápa, then in possession of Baslingawa, was sold. Subsequently, Sagawa adopted the plaintiff, Baswantápa, and filed a suit on behalf of her adopted son to set aside the sale and recover the house. It was held that the plaintiff was entitled to have the sale set aside. If Sagawa had wilfully put forward Baslingawa as the representative of Shidápa, it was said, so as to deceive and mislead Malkhana, then no doubt she might have been bound by the decree obtained against Baslingawa. But there was nothing to indicate that Sagawa took any step to deceive Malkhana, and her mere quiescence, while he wilfully sued the wrong person, could not deprive the plaintiff of his legal rights : *Bastwandpa Shidápa* v. *Ranu* and *Malkhana*, I. L. R. 9 Bom. 86.

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[8] The observations of *Turner, C. J.*, in this case as to the object of the use of the word "intentionally" in section 115, have been dissented from by the Privy Council in *Sarat Chandra De* v. *Gopal Chandra Laha*, L. R. 19 I. A. 203 : I. L. R. 20 Calc. 296.

In the following cases also it was held that there was no estoppel: *Shiddheshvar* v. *Ram Chandrarav*, I. L. R. 6 Bom. 463 (Mortgage after the adoption by the adoptive mother of A, who promised his adoptive mother to redeem the mortgage): *In re Parmanandidas Jivandas*, I. L. R. 7 Bom. 109 (Rights of Secretary of State under lease against person whose position had not been altered): *Gheran* v. *Kunj Bihari*, I. L. R. 9 All. 413 (Prior decree-holder bidding at a sale held at instance of subsequent decree-holder for property previously purchased by him, and afterwards suing for a declaration that such property was not affected by the sale): *Banwari Das* v. *Muhammad Mashiat*, I. L. R. 9 All. 690 (Decree-holder who held prior registered incumbrance over property about to be sold making bids at sale and not personally announcing his incumbrance): *Muhammad Saminddin Khan* v. *Mannu Lal*, I. L. R. 11 All. 386 (Assignee of original mortgagor allowing original mortgagor to sue for redemption, and subsequently suing on his own account for redemption).

In *Gurupadapa* v. *Irapa*, I. L. R. 14 Bom. 558, the defendants had been sued by a creditor of their undivided grand-uncle as his legal representatives, and a decree had been obtained against them as such. In execution of that decree a house was put up for sale and purchased by the plaintiff. The surplus of the sale-proceeds after satisfying the decree was paid to the defendants, who divided the amount between themselves. When the plaintiff endeavoured to take possession of the house, he was obstructed by the defendants, on the ground that they had an interest in the house in their own right. The plaintiff then sued for possession and urged that the defendants were estopped from impeaching the sale and setting up their own title. It was, however, held that the defendants were not so estopped. Proceedings in execution, it was said, were *in invitum* as regards the judgment-debtor, and he was in no way called upon to notice them. It was further pointed out that it had not been suggested that the defendants had taken any part in the execution-proceedings, or had stood by so as to induce bidders to suppose that they claimed no interest other than as representatives of the original judgment-debtor, or that their silence had misled the bidders at the sale. As to the defendants having received the residue of the purchase-money after satisfaction of the judgment-debt, that was after the purchase had been completed, and, moreover, there was no evidence to show that the plaintiff had ever concerned himself with the appropriation of the purchase-money or knew what was done with it.

There is, however, one case, *Solano* v. *Ram Lal*, 7 C. L. R. 481, in which there was held to be no estoppel, although the prior decree-holder had brought the property to sale, giving an incorrect description of it, and not giving notice of his own interest in it. In this case the defendant, Solano, had, in execution of a decree for costs, put up for sale the right and interest of his judgment-debtor to the extent of 16 annas. It appeared that in a former suit he had already been adjudged a 12-anna share in the property. The plaintiff, who became the purchaser, accordingly claimed to be entitled to the whole 16 annas alleging that he had been misled by the description of

the property sold. It was, however, held that to bring the case within section 115 of The Evidence Act, the following findings were necessary: (1) that the plaintiff believed that the judgment-debtor, whose rights and interests were sold, was the owner of the whole 16 annas; (2) that, acting upon that belief, he purchased the property at the sale; (3) that that belief, and the plaintiff's so acting on that belief, were brought about by some declaration, or act, or omission on the part of the defendant, which declaration, act or omission were intentionally made in order to produce that result, and inasmuch as the finding of the District Judge did not amount to this, there was no estoppel.

Where the plaintiff sued for possession of certain property in right of the next reversionary heir, and for setting aside a deed of sale executed by the widow, of the last full owner, and it appeared that the plaintiff's vendor had executed this deed as general mukhtar, executor, and adopted son of the widow, making a general renunciation of title as mukhtar, but had after the widow's death derived title from the said reversionary heir, it was held that the plaintiff and his vendor were not estopped, the fair construction of the deed being that the vendor was only selling what his principal had to sell, there being no representation that he was selling on his own account, and the plaintiff not denying the truth of any fact represented in the deed; further, that section 43 of The Transfer of Property Act was not applicable, as the vendor had not represented that he was authorized to transfer any other interest than that of his principal: *Nurul Hossein* v. *Sheo Sahai*, L. R. 19 I. A. 221: I. L. R. 20 Calc. 1.

Estoppel of tenant;

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.

and of licensee of person in possession.

"No rule," says Mr. Smith in his note to the *Duchess of Kingston's* case, "can be more clearly settled than that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered. The case oftenest cited for this is, perhaps, *Doe d. Knight* v. *Lady Smythe* (4 M. & S. 347). 'It has,' said *Dampier, J.*, in that case, 'been ruled often that neither the tenant nor any one claiming by him can dispute the landlord's title. This, I believe, has been the rule for the last twenty-five years, and,

Tenant.

I remember, was so laid down by *Buller, J.*, upon the Western Circuit.' Accordingly, in *Doe d. Bullen* v. *Mills* (2 B. & Ad. 17), it was held that if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title." This rule has been acknowledged and acted upon in India: *Jainarain Basu* v. *Kadambini Dasi* (7 B. L. R. 723, *note*). In the case of *Donzelle* v. *Kedarnath Chakravartti* (7 B. L. R. 720: 16 W. R. 186: 20 W. R. 352). A had executed a *kabuliyat* to B, the *zamindar*. B subsequently granted a *patni* lease to C, who sued A for rent upon the *kabuliyat* executed in favour of his superior landlord. A admitted the execution of the *kabuliyat*, but pleaded that B was not the real owner, being merely a *benamidar* for her husband. It was contended that A was estopped from denying B's title; but it was held that the technical doctrine of estoppel had no application, and that it was open to A to prove his plea. This case was decided before The Indian Evidence Act came into operation, but there is another case to the same effect: *Indrabati Koqr* v. *Mahbub Ali*, 24 W. R. 44, which is of date subsequent to the passing of The Evidence Act. It has been decided in England that where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed (*Fleming* v. *Gooding*, 4 M. & Scott 455 10 Bing. 549).

It has further been decided that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment: *Jamsedji Sorabji* v. *Lakshmiram Rajaram*, I. L. R. 13 Bom. 323.

Licensee.

An example of the principle applied to a licensee is supplied by the case of *Doe d. Johnson* v. *Baytup* (3 Adolphus and Ellis's Reports 188), in which the defendant asked leave of the party possessed to get vegetables in the garden, and having thus obtained an entrance, took possession of the house, claiming a title. It was held that he was estopped, and that if he wanted to establish his title, he must first give up possession to the party by whom he was let in. In *Gaur Hari Mal* v. *Amirunnissa Khatun*, 11 C.L.R. 9, which was an ejectment suit in respect of a *jalkar* in a navigable river, the defendants pleaded that the river being a navigable one, they, as members of the public community, were entitled to exercise a right of fishery therein, and neither Government nor the plaintiff were entitled to the exclusive right of fishery. But it was held that the defendants being licensees, and having paid rent to the plaintiff, were precluded from setting up this defence.*

Tenant may show expiry, &c., of landlord's title.

Although a tenant may not, during the continuance of the tenancy deny that his landlord had a title at the beginning of such tenancy, he may show that such title has expired or has been defeated by a title paramount (*Ammu* v. *Ramakrishna Sastri*, I. L. R. 2 Mad. 226: *Burn & Co.* v. *Bishomayi Dasi*, 14 W. R. 85:

* For further provisions as to licenses, see ss. 52 to 56, Act V of 1882, which, however, does not extend to Bengal.

Mohan Mahtu v. *Shamasul Huda*, 21 W. R. 5: *Gopanand Jha* v. *Gobind Prasad*, 12 W. R. 109). Here he does not dispute the title, but confesses and avoids it by matter *ex post facto*.

The tenant may not deny that his landlord had a title *at the beginning of the tenancy*. English text-writers, in discussing the principle, generally speak of *the letting into possession* as that which creates the estoppel, and the application of the principle has in more than one case[5] depended upon the answer to the question, what constitutes a letting into possession. "In one case," says Mr. Taylor, "where a party was in possession of premises without leave obtained from any one, and a person came to him and said, 'you have no right to the premises,' upon which he acquiesced and took a lease from this person, the Court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other. But, in a subsequent case, where a tenant, being already in possession of premises under a demise from a termor, had, at the expiration of the termor's right, when his own title also expired, entered into a parol agreement with another party, to hold the premises under him, but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises,—it was held that the agreement was not equivalent to a first letting into possession. This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party by whom he was *not let into possession*, nor an attornment, nor an actual payment of rent to such party, even under a distress, will in themselves operate as estoppels, but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances or in the case of payment of rent, that some other party was entitled to receive it." (§ 90; § 103, 8th edn.)

Cannot deny title at beginning of tenancy.

So, in this country it has been held that the words "at the beginning of the tenancy" only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession; so that when A, a raiyat, being in possession of a certain holding executed a *kabuliyat* regarding this holding in favour of B, who claimed the land in which the holding was included under a derivative title from the last owner, and paid rent to B thereunder, it was held that A was not estopped from disputing B's title: *Lal Mahomed* v. *Kalonas*, I. L. R. 11 Calc. 519. *Brajanath Chaudhri* v. *Lal Miah Manipuri*, 14 W. R. 391: *Jesingbhai* v. *Hataji*, I. L. R. 4 Bom. 79; and one who pays rent to another, believing him to be the landlord's representative, is not estopped from afterwards showing the want of title in that other: *Beni Madhab Ghosh* v. *Thakurdas Mandal* (B. L. R. F. B. 588: 6 W. R. Act X. 71: *Gauri Das* v. *Jagannath Rai*, 7 W. R. 25), and there is

[5] See the remarks of *Tindal, C. J.*, in *Claridge* v. *Mackenzie*, 4 Manning & Granger's Reports 152.

nothing to prevent a tenant from questioning the title of the alleged assignee of his admitted landlord: *Tilleshari Koer* v. *Asmedh Koer*, 24 W. R. 101. In *Subbaraya* v. *Krishnappa*, I. L. R. 12 Mad. 422, the plaintiff demised certain waste land, adjacent to his own land to a cultivator who brought it under cultivation, but the land was not assessed to revenue. The cultivator sub-let the land to a third person, who assigned his rights in it to the defendant, who obtained a pattah for the land from the Revenue authorities, and it was held that he was not estopped from setting up a title adverse to the plaintiff, because all waste lands in the Madras Presidency belong to the State, who can grant such land to any one it pleases.

Effect of payment and receipt of rent.

It will be convenient to consider here the effect of the receipt and payment of rent as an admission of the relation of landlord and tenant. In the case of *Doe d. Harvey* v. *Francis* (2 Maclean and Robinson's Scotch Appeals, 57) *Patterson, J.*, said: "that where a tenancy was attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received." It has been held, however, that the tenant will be concluded by payment of rent, if he cannot show that it was paid under a mistake or that some other person was entitled to it, or cannot show some special reason to the contrary. Submitting to a distress and paying rent under it is a strong admission of title in the distrainer, but it is not conclusive and may be rebutted by showing that he never had any title. A distress by the landlord admits the tenancy to be a subsisting relation up to the time of distraining. Speaking generally, these principles have been followed in India—see the following cases, *viz.*:—*Vasudev Daji* v. *Bapuji Ramu*, 8 Bom. H.C. Rep. A. C. J. 175: *Abhai Gobind Chaudhri* v. *Bijai Gobind Chaudhri*, 9 W. R. 162 (Admission of payment of rent held equivalent to admission of tenancy in the absence of evidence to rebut): *Beni Madhab Ghosh* v. *Thakur Das Mandal*, B. L. R. F. B. Sup. Vol. 588; 6 W. R. F. B. 71 (Payment of rent not conclusive, but only *primâ facie* evidence, which the tenant is not estopped from rebutting, if he can): *Mohesh Chandra Basu* v. *Ugra Kant Banarji*, 24 W. R. 127 (Receipt of rent by reversionary heir held to ratify tenure granted by widow while she held the estate): *Venkata Gopal* v. *Rangappa*, I. L. R. 7 Mad. 365, F.B. (Contract to pay a certain rent implied from payment for a number of years). See also *Durga* v. *Jhinguri*, I. L. R. 7 All. 515, 878. When a person purchased an under-tenure alleged to be transferable, and contended that the zamindar by receiving rent from him had conclusively admitted him as purchaser to be his under-tenant, it was held that mere acceptance of rent could not have such an effect, though it might be otherwise if such acceptance were with notice or full knowledge of the fact. In the absence of such notice, it was observed that the payments might have been voluntary payments, or payments such as that of a mortgagee

to save his own interest, which a zamindar is not bound to recognize (*Mritan Jai Sirkar* v. *Gopal Chandra Sirkar*, 2 B. L. R. A. C. 131 : *Gaur Lal Sirkar* v. *Rameswar Bhumik* 6 B. L. R. App. 92). Where a landlord with full knowledge of the facts accepted rent from his tenan 's mortgagee, it was held that he was thereby estopped from disputing the mortgage (*Ganga Bissen* v. *Ram Gut Rai*, 2 N.-W. P. Rep. 49). It has been held that Government is not estopped from claiming land as an escheat in default of heirs by having received revenue from a person who entered after the death of the proprietor, who left no heirs (*The Government* v. *Giridhari Lal Rai*, 4 W. R. 13).

The relation of landlord and tenant, when proved to have existed, will not be determined by mere non-payment of rent even for twelve years (*Rango Lall Mandal* v. *Abdul Ghafur*, I. L. R. 4 Calc. 314 : 3 C. L. R. 119 : *Thakurani Dasi* v. *Bisheshar Mukharji*, B. L. R. F. B. Sup. Vol. 321 : *Tiruchurna Perumal Nadan* v. *Sanguvien*, I. L. R. 3 Mad. 118 : *Dadoba* v. *Krishna*, I. L. R. 7 Bom. 34 : *Tatia* v. *Sadashiv*, I. L. R. 7 Bom. 40 : *Sristidhar Mazumdar* v. *Kalikant*, 1 W. R. 171 : *Watson Co.* v. *Sarat Sundari Debi*, 7 W. R. 395 : *Trailakhyo Tarini Dasi* v. *Mahima Chandra Matak*, 7 W. R. 400 : *Girish Chandra Rai* v. *Bhagwan Chandra Rai*, 13 W. R. 191 : *Lakhu Khan* v. *Wise*, 18 W. R. 443 : *Duli Chand* v. *Sham Bihari Singh*, 24 W. R. 113 : *Haradhan Rai* v. *Halodhar Chandra Chaudhri*, 25 W. R. 56 : *Raj Kisho Sarma Chakravartti* v. *Girija Kant Lahiri*, 25 W. R. 66 : *Poresh Narain Rai* v. *Kashi Chandra Talukdar*, I. L. R. 4 Calc. 661). Discontinuance of payment of rent is not dispossession : *Tarini Mohan Mazumdar* v. *Ganga Prasad Chakravartti*, I. L. R. 14 Calc. 649. It has been held that the resumption of *takhiraj* land does not dissolve the contract between the landlord (former *lakhirajdar*) and his tenant, but that the tenant has the option either to determine the tenancy or consent to have the revenue payable to Government by his landlord, or a portion of it, added to his former rent (*Farzhara Banu* v. *Azizanissa*, B. L. R. Sup. Vol. F. B. 175).

If a landlord sue A for rent, and afterwards discover that A only holds *benami*, while B is the real tenant, he is not thereby estopped from suing B subsequently on his discovering the real state of things (*Prasanna Kumar Pal Chaudhri* v. *Kailas Chandra Pal Chaudhri*, 7 W. R. 97 : *Bipin Bihari Chaudhri* v. *Ram Chandra Rai*, 5 B. L. R. 235 : *Jadunath Pal* v. *Prasannonath Dutt*, 9 W. R. 71 : *Hiralal Bakshi* v. *Rajkissor Mazumdar*, W. R. Sp. No. 58). In this last case, which was heard by a Full Bench, *Peacock, C. J.*, said : "It was necessary to try whether Hiralal was the real proprietor, and whether Rupchand was merely his agent or not. The Judge had power to determine that question, and has found that the *izarah* was *benami*, and that Hiralal was the actual farmer and person beneficially interested in it. That being so, we are of opinion that Hiralal, as the proprietor, was liable for the arrears of rent. It is a general rule of English law that when an agent enters into a contract in his own name as principal without disclosing the fact that he

Benami tenancy.

is acting merely as agent, the principal when discovered is liable to be sued upon the contract. But the principal is not liable upon the contract of his agent, if the other party to the contract with full knowledge of the facts, and having the power and means of deciding to whom he will give credit, elects to give credit to the agent in his individual character.[6] This rule is founded on principles of justice, and is applicable as well in this country as in England." It is also a rule of English law that when the agent contracts in his own name as principal, parol evidence, though admissible to charge the real principal, is not admissible to discharge or exonerate the agent.[7] Where the contract on the face of it purports to have been made between A and B, and it is sought to show by oral evidence that not A and B, but A and C, were the contracting parties, it may be said that this is really introducing oral evidence to contradict the writing. *Norman J.*, took this view in *Bipin Bihari Chaudhri* v. *Ram Chandra Rai* (5 B. L. R. 243), and was of opinion that it could not be done. Whether the provisions of The Evidence Act alter the question is a point about which there may be a difference of opinion. Section 92 makes no express exception in favour of the admissibility of this evidence. In *Trueman* v. *Loder* (11 Adolphus and Ellis's Rep. 595) the Lord Chief Justice said: "Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it: whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question—who is the person who has just ordered goods in a shop? If he is sued for the price and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own."

There is one more point connected with the present subject which it will be desirable to notice, more especially as the rule in India does not agree with the rule in England. Under English law, a tenant, by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender the previous tenancy. Some doubt has been of late years thrown upon this doctrine in England; but it may safely be said that it has no application to land in India out of the Presidency-towns, it being notoriously customary for tenants who hold protected tenures to accept fresh leases upon every change of proprietorship, whether by inheritance, private sale, or auction-purchase. The new lease is generally regarded as confirmatory of the tenure, and the fact of the tenure being an old one is occasionally, though not always, mentioned therein—see *Ramchandra Dutt* v. *Jageshchandra Dutt*, 12 B. L. R. 229: *Udit Narain Singh* v. *Abharam Rai*, 4 W. R. Act X, 1. *Pado Mani Dasi* v. *Jhotta Pali*, 7 W. R. 283.

Effect of fresh lease

[6] See *Paterson* v. *Gandasequi*: *Addison* v. *Gandasequi*: *Thomson* v. *Davenport*, 2 Smith's Leading Cases, 347, 356, and 364; and sections 232, 233, and 234 of The Indian Contract Act, IX of 1872.

[7] See 2 Smith's Leading Cases 393, *et seq.*

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

"The acceptance of a bill of exchange," says Mr. Taylor, "is also deemed a conclusive admission, as against the acceptor, of the signature of the drawer, and of his capacity to draw; and, if the bill be payable to the order of the drawer, of his capacity to indorse; and, if it be drawn by procuration, of the authority of the agent to draw in the name of the principal; and it matters not, in this respect, whether the bill be drawn before or after the acceptance. The law, however, in general recognizes no such admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer, or of that of any other indorser; and this too, although, at the time of the acceptance, the indorsements were on the bill. Neither does the acceptance admit that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same. So, if on a bill payable to the order of the drawer the name of a real person as drawer and indorser be forged, it seems that the mere acceptance of such bill, in ignorance of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit; but if the acceptor with knowledge of the forgery puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing"—(§ 778, § 851: 8th edn). See also Story on Bills of Exchange, §§ 113, 114, 115, 252, 262, 412. Under the provisions of section 120 of The Negotiable Instruments Act, XXVI of 1881, a maker of a promissory note, a drawer of a bill of exchange or cheque and an acceptor of a bill of exchange for the honor of the drawer are, in a suit by a holder in due course, estopped from denying the validity of the instrument as originally made or drawn. Under section 121 of the same Act a maker of a promissory note and an acceptor of a bill of exchange payable to, or to the order of, a specified person are, in a suit thereon by holder in due course, estopped from denying the payee's capacity at the date of the

note or bill to indorse the same. Under section 122 an indorser of a negotiable instrument is, in a suit thereon by a subsequent holder, estopped from denying the signature or capacity to contract of any prior party to the instrument.

As to *Bailments*, see Chapter IX, sections 148—181 of The Indian Contract Act, IX of 1872. Section 167 enacts that if a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor and to decide the title to the goods.

The Act is silent on the subject of *Agents*, who are not, ordinarily, permitted to set up the adverse title of a third person to defeat the rights of their principals, or to dispute the title of their principals—Story on Agency, § 217.

CHAPTER IX.

OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

The tendency of modern legislative progress, discriminating between the *competency* and the *credibility* of witnessess, has operated to remove former grounds of exclusion, and to admit to the witness-box all persons from whom even a grain of truth can be gleaned, leaving it to the Court to attach to their evidence that amount of credence which it appears to deserve from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. To Mr. Bentham and Lord Brougham are due the results which have been achieved in this respect in England. The sound theories of the former and the practical wisdom and legal ability of the latter, have produced the present satisfactory state of the law thus described by a popular writer. "As the admission of evidence generally is the rule and the exclusion of it the exception, so it is with witnesses. Their competency is the rule: their incompetency the exception, and that incompetency lies now within a very narrow compass. With the admission of the very parties themselves

in civil cases, subject to few and specified exceptions, disappeared the last vestige of exclusion in civil cases . . . . . Such questions as can now be raised as to the competency of a witness must be determined by the Judge. Once declared by him competent, the credibility of the testimony given by the witness is determined by the jury alone; or by the Court or a Judge, where respectively empowered or required to determine questions of fact either with or without juries."[8]

The above section of The Indian Evidence Act extends admissibility to its utmost reasonable limits, for it declares *all persons* to be *competent* to testify, unless they are in the opinion of the Court unable to understand the questions put to them or to give rational answers to those questions. When, therefore, a child is produced as a witness, the only question is whether it has sufficient intelligence to understand the questions put to it and give rational answers thereto. When a Sessions Judge thought a child sufficiently intelligent to understand and answer, but too young to understand the nature of an oath and therefore advisably examined it on simple affirmation, it was held with reference to section 13 of "The Oaths Act" that the evidence was none the less admissible (*Queen* v. *Ituarya*, 14 B. L. R. 54: 22 W. R. Cr. R. 14: *Queen* v. *Sewa Bhogla*, 14 B. L. R. 294, a decision of a Full Bench overruling *Queen* v. *Ananto Chakravartti*, 14 B. L. R. 295 *note*: 22 W. R. Cr. 1). This was dissented from in *Queen-Empress* v. *Maru*, I. L. R. 10 All. 207; but affirmed in *Queen-Empress* v. *Shava*, I. L. R. 16 Bom. 359.

In a recent case in the North-West Provinces, one of the witnesses was a boy of 12 years of age, and in answer to questions put by the Sessions Judge he said he worshipped Debi, and understood the difference between truth and falsehood, that he did not know the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge recorded the boy's statement, but without administering any oath or affirmation. The Allahabad High Court held that there was nothing in the law to sanction this procedure. The law, it was said, required that every person made a witness should be either sworn or affirmed, and a Court under section 118 of The Evidence Act has not to enter into enquiries as to a witness's religious belief, but to ascertain in the best way it can whether from the amount of intellectual capacity and understanding of a young or old person that that person is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion; and if the Court is satisfied that a child of twelve years old or an old man or woman can satisfy those requirements, the competency of the witness is established.

A question was raised under this section, as to whether an accused person in a criminal case can be examined as a witness on his own behalf. This question was decided in the negative. In order to testify, it may be observed, that an oath or solemn affirmation must be administered to the person called as a witness.

Can accused person testify?

[8] Mr. Warren's *Law Studies*, Vol. II, p. 1110.

The Code of Criminal Procedure, while expressly providing for the examination of the accused person, enacts that "no oath shall be administered to the accused" (section 342). This clearly shows that it was not the intention of the Legislature that accused persons should be competent witnesses on their own behalf, at least in cases governed by the Code of Criminal Procedure.

Where there are several persons jointly accused, the rule at one time followed in England was that any one of them might be called as a witness either for or against his co-defendants, excepting only in those cases where the indictment was so framed as to give him a direct interest in obtaining their discharge; and this rule has been approved of in India (*Queen* v. *Ashraff*, 6 W. R. Cr. 91). But now in England it has been settled by *Reg.* v. *Payne* (L. R. 1 C. C. 349) that where two prisoners are tried together, one is not a competent witness for the other. This is also the rule now followed in this country. See *Reg.* v. *Hanmanta* (I. L. R. 1 Bom. 618), where an opinion was expressed that a Magistrate cannot convert an accused person into a witness, except when a pardon has been lawfully granted to him under the provisions of the Code of Criminal Procedure, and the evidence of such a person was rejected as inadmissible. See also *Reg.* v. *Remedios*, 3 Bom. H. C. Rep. Cr. 59: *Empress* v. *Asghar Ali*, I. L. R. 2 All. 260: and *Queen-Empress* v. *Dala Jiva*, I. L. R. 10 Bom. 190. In *Mohesh Chandra Kopali* v. *Mohesh Chandra Das* (10 C. L. R. 553) a charge of theft was made against A and B. Process was issued against A only, and B was held to be a competent witness for A's defence; and in *Queen-Empress* v. *Mona Puna* I. L. R. 16 Bom. 661) it was ruled that a person who had been arrested as an accused by the Police but illegally discharged by them was competent to testify, as by the word "accused" in section 342, Criminal Procedure Code, is meant a person over whom the Court or Magistrate is exercising jurisdiction. In *Queen* v. *Bihari Lal Basu* (7 W. R. Cr. 44) it is pointed out that there is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution.

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to civil suit, and their wives or husbands.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Husband or wife of person under criminal trial.

Section 118 declares all persons, speaking generally, to be *competent* witnesses; but a person may be a *competent* without being a *compellable* witness. His testimony may be admissible if he be examined, or if he offer himself as a witness, but he may have some protection or privilege, so that, if he be unwilling, he cannot be compelled to give evidence. This protection or privilege may be general as regards the whole of a case; or it may concern only some particular subject of evidence, so that the same person may be at one time compellable and at another time not compellable, and this even in the same examination. Again, there are some rare instances in which the law goes still further and will not permit the witness to speak, even if he be willing. The eleven sections which follow will supply illustrations of these remarks. The procedure to be followed in order to *compel* the attendance of witnesses to give evidence in civil and criminal cases forms a portion of the Codes of Civil and Criminal Procedure.

Witness may be competent without being compellable.

Formerly, *parties* to civil suits and the *husbands and wives of parties* were not competent as witnesses. It was thought that the interest they had in the subject-matter of the dispute must make their testimony unreliable, if not false. We have seen (*ante*, page 16) under what auspices the law on this point was altered in England and in India. Under the old Code of Civil Procedure, if it was sought to call as a witness a party to the suit, who did not of his own accord appear in person, it was necessary to serve him with a notice to show cause why he should not attend and give evidence. This is no longer necessary under the new Code, and the position of parties to the suit is in no wise different from that of other witnesses.

Section 55 of The Indian Succession Act, X of 1865, enacts that no person by reason of interest in, or of his being an executor of, a will is disqualified as a witness to prove the execution of the will, or to prove the validity or invalidity thereof.

Parties to suits instituted *in consequence of adultery* and also their husbands and wives were formerly not competent as witnesses in such suits. The law on this point was altered in England by the 32 & 33 Vict., cap. 68, section 3, with this proviso, that no witness, whether a party to the suit or not, shall be liable[9] to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in

Suits under The Divorce Act.

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[9] If the witness, without claiming the benefit of the proviso, give the evidence, it will be admissible, and it is not competent to Counsel for either party to exclude it (*Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & M. 29). The statements, written or verbal, of a respondent not examined as a witness are not evidence against a co-respondent) *Hay* v. *Gordon*, 10 B. L. R. 301).

disproof of his or her alleged adultery. Apart from the 32 & 33 Vict., cap. 68, section 3, the law in England appears to stand thus—On a petition presented by a wife, praying that her marriage may be *dissolved* by reason of her husband's adultery coupled with cruelty or desertion, the husband and wife respectively are *competent* and *compellable* to give evidence of or relating to such *cruelty* or *desertion*, but not as to the adultery (22 & 23 Vict., cap. 61, section 6); this provision, however, does not apply when the petition is for judicial separation on the ground of adultery; in all suits for nullity of marriage, for judicial separation on account of cruelty or desertion (not coupled with adultery), for jactitation of marriage or for restitution of conjugal rights—unless in the last case the respondent by answer asks for a judicial separation on the ground of adultery—the husbands and wives are competent and compellable to be examined as witnesses on either side (See Taylor, §§ 1220-1221; §§ 1353-1354, 8th edn.). but (20 & 21 Vict., cap. 85, section 43) the Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition,[1] but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery. Section 51 of "The Indian Divorce Act," IV of 1869, enacts that "the witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and *any party may offer herself or himself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness: provided that* the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed." Section 52 enacts that, "on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be *competent* and *compellable* to give evidence of or relating to such *cruelty* or *desertion*." The result is that, though, upon a petition by a wife for dissolution of the marriage on account of adultery coupled with cruelty or desertion, the parties are *competent* and *compellable* to give evidence as to the *cruelty* and *desertion*, they cannot in this case be examined or cross examined as to facts relating to acts of *adultery* and cannot in other cases be examined at all, unless they *offer themselves* as witnesses (see *Kelly* v. *Kelly and Saunders*, 3 B. L. R. App. 6), or verify their cases by affidavit.[2] It will thus appear that the rule as to the parties to matrimonial

[1] See this power exercised in *Tatham* v. *Tatham and Nutt*, 33 L. J. P. M. & A. 140.

[2] Section 45 of The Divorce Act further enacts that, "subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

cases being competent and compellable to give evidence is more restricted in India than in England. The co-respondent, in a suit by a husband for the dissolution of his marriage on the ground of adultery, was summoned by the petitioner as a witness. He was sworn without objection and answered the questions put to him, until he was asked whether he had had sexual intercourse with the respondent. The Court in reply to his inquiry told him that he was bound to answer this question, and he answered it in the affirmative. He would not have answered it, if he had been aware that he might have declined. It was held that he had not "offered" to give evidence within the meaning of section 51, and that his answer to the particular question was not admissible (*De Bretton* v. *De Bretton and Holme*, I. L. R. 4 All. 49).

Husbands and wives in criminal proceedings.

So much of the section as declares husbands and wives competent witnesses against each other in criminal proceedings differs from the rule of English law, which does not allow the admission of this evidence, except when an injury to person or property has been committed by the one against the other (Taylor, §§ 1236-1237; §§ 1371-1372, 8th edn.); but is in accordance with the Full Bench decision of the Calcutta High Court in the case of *Queen* v. *Khairulla* (6 W. R. Cr. 21: B. L. R. Sup. Vol. F. B. App. 11). Here *Peacock, C. J.*, said:—"Two questions have been referred in this case: 1*st*,—Whether, upon a trial in the Mufassil of a person charged with an offence, his wife is competent to give evidence for or against him? 2*nd*,—Whether, upon a trial in the Mufassil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others? I am of opinion that both of those questions must be answered in the affirmative. It is a general rule of English law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But the English law is not the law of the Mufassil. . . . . It is clear that the English Criminal Law was not the Criminal Law of the Mufassil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there."

Proceedings under section 488 of the Code of Criminal Procedure, which provides for the passing of orders for the maintenance of wives and children, are in the nature of civil proceedings within the meaning of section 120 of The Evidence Act, and the defendant thereto may give evidence on his own behalf (*In the matter of Toki Bibi* v. *Abdul Khan*, I. L. R. 5 Calc. 536: *Nur Mahomed* v. *Bismilla Jan*, I. L. R. 16 Calc. 781).

As to whether a Judge or Magistrate can give evidence in a case tried by himself, see the note to section 121, *post*, pp. 573-575.

Section 294, Criminal Procedure Code, provides for the examination as witnesses of jurors and assessors in cases in which they may be exercising their functions. Unless examined as witnesses, their personal knowledge of the character of the witnesses should not be given or recorded (*Queen* v *Ram Charan Karmakar*, 24 W. R. Cr. 28).

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Judges and Magistrates.

Illustrations.

(*a*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(*c*) A is accused before the Court of Session of attempting to murder a Police-officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

It will be important to notice that the privilege of the Judge or Magistrate extends only "*to his own conduct in Court as such Judge or Magistrate, or to anything which came to his knowledge in Court as such Judge or Magistrate:*" and it seems that, if he himself make no objection to answer the questions asked, no one else is entitled to object.[2] When a Sessions Judge summoned a Deputy Magistrate, who had not complied with the provisions of the Code of Criminal Procedure as to recording the examinations of certain accused persons (see section 346 of the old, and sections 364 and 533 of the new Code) and examined him as to the statements recorded by him having been made, and the District Magistrate objected that this course was contrary to law without the *special order* of the High Court or of the District Magistrate (to whom alone it was said that the Deputy Magistrate was subordinate), it was held that the privilege was the privilege of the witness, and if he did not object, it did not lie in the mouth of any other person to assert the privilege (*Empress* v. *Chidda Khan*, I. L. R. 3 All. 573).

Extent of the privilege.

Arbitrators are within the rule in England. The definition of "Court" in The Evidence Act (*ante*, section 3) does not include arbitrators. There

[2] So *per* Lord Alvanley in *Martin* v. *Thornton*, 4 Espinasse's Rep. 181.

is no definition of the word "Judge" in the Act.* An arbitrator would therefore seem not to come within the rule laid down by this section.

Can a Judge be a witness in a case tried by himself?

It will be convenient to notice in this place the question whether a Judge or Magistrate can give evidence in a case tried by himself. "A Judge before whom the cause is tried," says Mr. Taylor, "must conceal any fact within his own knowledge, unless he be first sworn: and consequently, if he be the sole Judge, it seems that he cannot depose as a witness, though, if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the Bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another"—(§ 1244; § 1379: 8th. edn.) see also *ante*, p. 67. In the case of *Queen* v. *Mukta Singh* (4 B. L. R. Cr. 15: 13 W. R. Cr. 60), the above passage and the cases cited in support of the views expressed therein were referred to; and it was held that a Sessions Judge was a competent witness in a case tried by himself with the aid of assessors, provided that he had no personal or pecuniary interest in the subject of the charge. In the case of *Haro Chandra Pal* (20 W. R. Cr. R. 76) a Deputy Magistrate had taken an active part in the capture of certain persons alleged to be members of an unlawful assembly, and then proceeded to try them. *Phear, J.*, said:—"It has been held by this Court, and is accordant with the general principles which govern the conduct of an English Court of Criminal Justice, that, while a person is not necessarily disqualified from presiding as a Judge, or acting as a juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he is bound to state to the prisoner or other person concerned, or to make known to him, as far as he can, what are the facts which he himself observed, to which he himself can bear testimony. And moreover, the prisoner, who is being tried by a Judge in this situation, has a right, if he thinks it desirable, to cross-examine the Judge, who, under these circumstances and to this extent, must be viewed as a witness, and his evidence should be recorded. . . . The awkwardness of a Criminal Judge being the principal witness in the case which he has to try is no doubt most apparent; this, however, is reason for his declining to try the case." In the case of *Empress* v. *Donnelly* (I. L. R. 2 Calc. 405), *Markby, J.*, said:—"As to the point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this:—Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been strongly contended on the part of the

* See the definition of "Judge" in section 19 of the Penal Code. It has been decided in England that a barrister cannot be called as a witness to prove what he said when conducting a case in Court (*Curry* v. *Walter*, 1 Esp. 456).

an affidavit or the Judge's own admission that the record he made was wrong: *Har Doyal Singh* v. *Hira Lal*, 16 W. R. 107.

Communications during marriage.

122. No person who is or has been married shall be compelled to disclose any communication made to him[6] during marriage by any person to whom he[6] is or has been married; nor shall he[6] be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Extent of the protection.

"The protection," says Mr. Taylor, "is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all communications of whatever nature* which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated 'during the marriage; and consequently if a man were to make the most confidential statement to a woman *before* he married her, and it were afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter" (§ 830; § 909, 8th edn., and see 16th and 17th Vict. cap. 83, section 3). The privilege continues even after the marriage has been dissolved by death or divorce. Where a woman, divorced and subsequently married to another man, was offered as a witness of a matter of which she had become cognizant during her first coverture, Lord Alvanley rejected the evidence, adding—"It can never be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved." The words "has been married" in the above section of The Evidence Act give full effect to this dictum in India. Not merely is the married person *protected* from being compelled to disclose; but further, even if he be willing, he is not to be *permitted* to disclose any communication made during the marriage, *unless* the person who made it or his representative in interest consents, *except* in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. With this Exception should be read section 120, *ante*, p. 568.

Exception.

[6] "Words importing the masculine gender shall be taken to include females"—section 2 of "The General Clauses Act," I of 1868.

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

The above two sections (123 and 124) as well as sections 121, 122, 125, 126, 127, 128, 129, 130, and 131 are applicable equally to oral and to documentary evidence (see definition of "Evidence," *ante*, p. 87, and the second proviso to section 165, *post*).

"Affairs of State."

The meaning of "affairs of State" will be rendered more intelligible by some account of the manner in which the rule has been applied in other countries. No witness, whether a peer, member of the House of Commons, officer of either House or short-hand writer, can, without the permission of the House, be examined as to what took place within the walls of Parliament. On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers* are in general treated as secrets of State. Thus, communications between a Colonial Governor and his Attorney-General on the condition of the colony,[1] or the conduct of its officers, or between such Governor and a military officer under his authority; the report of a military commission of enquiry made to the Commander-in-Chief and the correspondence between an agent of the Government and a Secretary of State; or between the Directors of the East India Company and the Board of Control under the old law; or between an officer of Customs and the Board of Commissioners—are confidential and privileged matters, which the interests of the State will not permit to be revealed. The proceedings of the *Grand Jurors* are in England regarded as privileged communications, and would doubtless have been so regarded in the Presidency Towns before the abolition of the Grand Jury system. The testimony of *Petty Jurors* is, on similar grounds, inadmissible to prove *mistake* or *misbehaviour* in the jury in regard to the verdict. But the Court will admit evidence of such misconduct either from the officer in charge of the jury, or from some other person who actually witnessed the transaction. Communications between Collectors and Commissioners, and between Commissioners and the Board of Revenue, or the Government,

[1] As to communications of a defamatory nature sent by a foreign Consul to his own Government, see *Robert Charriol and another* v. *Lombard*, 1 Ind. Jur. N. S. 192.

would be within the rule in India. Instructions to Settlement Officers in the Punjab not only fall within the rule as to privilege, but section 9 of Act XXXIII of 1871, enacts that no Court of Justice shall permit evidence to be given of the contents of such instructions. The President of the United States and the Governors of the several States are not bound in America to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient. And the same doctrine, as it would seem, prevails in England, whenever Ministers of State are called as witnesses for the purpose of producing public documents. If, however, the Minister, instead of attending personally at the trial, should send the required papers by the hands of a subordinate officer, the Judge would probably examine them himself, and would compel their production, unless he were satisfied that on public grounds they ought to be withheld. In the case of *The Rajah of Coorg* v. *The East India Company* (20 Jur. 407), it was decided that, in a suit instituted against the East India Company to enforce *a private right*, the Company was not bound to produce certain documents, the possession of which they admitted, but resisted the production of them on the ground that some of them were political communications which, in the fulfilment of the political duty of the Company and its Governments in India, had passed between the Company and those Governments, solely with a view to the government of India, and to enable the Company to perform its duty in that behalf; and that the rest of them were political communications, which passed between the official agents of the Company in India in fulfilment of their public political duty, and for the purposes of the public government in India. It was also held in the same case, that the production of political documents depended, not on the question of the person called on to produce them being a party to the suit or not, but upon the danger to the public interests which would result from their production. *When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.* It has, however, been held that in an action of trespass brought against the Governor of a colony, a military officer under his control might be asked, in general terms, whether he did not act by the direction of the defendant, though the written instructions could not be given in evidence. In the case of prosecutions against the Governor-General of India or any Member of Council, the 21 Geo. III. cap. 70, section 5, provides for compelling the production of the order or orders in Council complained of, and for the examination of witnesses upon the matter of the complaint. Communications, though made to official persons, are *not privileged, where they are not made in the discharge of any public duty;* such, for example, as a letter by a private individual to the Chief Secretary of the Postmaster-General, complaining of the conduct of the Guard of the mail towards a passenger.[8]

Taylor: §§ 864, 865, 866; §§ 945–948, 8th edn.

It will be observed that it is not the Judge, but the public officer concerned, who is to decide as to whether the evidence referred to in sections 123 and 124 shall be given or withheld. This is in accordance with the rule laid down in the English case of *Beatson* v. *Skene*[9] as to documents connected with affairs of State. One of the Judges who decided that case was, however, of opinion that, when a Judge is satisfied that a document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. The whole Court further were agreed that cases might arise where the matter would be so clear that the Judge might well ask for the document in spite of some official scruples as to producing it. A similar rule may, perhaps, be deduced in India from section 162, *post*, which makes no exception to the general provision therein contained, that the validity of any objection to produce shall be decided on by the Court. The second paragraph of this section runs—"The Court, if it sees fit, may inspect the document, *unless it refers to matters of State*, or take other evidence to enable it to determine on its admissibility." The position of the words italicised appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it *to determine on its admissibility*, and from this it may be inferred that it was intended to give the Court power to determine on such admissiblity. "Evidence" includes *documents* as well as *statements*, but it may be questionable if the words "evidence derived from unpublished official records" in section 123 were meant to include the records or documents themselves. If this meaning were not intended, there is no provision in The Evidence Act corresponding to the rule laid down in "*Beatson* v. *Skene*."[9]

Who is to decide as to whether the evidence shall be given.

In cases tried with a jury, the Judge is to decide all questions as to the admissibility of evidence (see section 298 of the Code of Criminal Procedure). In *Beatson* v. *Skene*[9] it was held that, whenever the question, whether a communication was privileged or not, involves matter of fact, it should be left to the jury. Reading together sections 298 and 299 of the Code of Criminal Procedure, it may be doubtful if this rule would be held to be law in India.

125. No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Information as to commission of offences.

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6 Jur. N. S. 780 : 29 L. J. Ex. 430.

Explanation.—'Revenue-officer' in this section means any officer employed in or about the business of any branch of the public revenue.[1]

"It is perfectly right," said *Eyre, C. J.*, in *Hardy's* case,[2] "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed." The rule in England is, that witnesses for the Crown will not be *permitted* to disclose the names of their employers or the nature of the connection between them, or the names of the persons from whom they received information, or the names of the persons to whom they gave information. The above section merely enacts that no Magistrate or Police-officer shall be *compelled* to say, but it does not prohibit him, if he be willing, to say whence he got his information. It is wholly silent as to persons other than Magistrates or Police-officers, *e.g.*, jurors.

Professional communications.

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [illegal[3]] purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such, showing that

[1] This section was substituted for the original s. 125 by Act III of 1887. By section 13, Act XV of 1887, Commandants and Seconds in Command of Military Police in Burma are entitled to all the privileges conferred by this section on Police-officers.

[2] 24 Howell's State Trials, 808.

[3] The word in brackets was substituted for "criminal" by section 10 of the amending Act, XVIII of 1872.

any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader,[4]] attorney or vakil was or was not directed to such act by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a*) A, a client, says to B, an attorney,—'I have committed forgery, and I wish you to defend me.'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Reason and object of the rule.

This section applies when a barrister, attorney, pleader or vakil is the party interrogated as a witness: and it will be observed that he is not only privileged and protected from disclosing, but that, even if willing, he is not permitted to disclose, unless with his client's *express* consent.

The Illustrations should be read in connection with the *proviso*. As to *Illustration* (*b*) see *Brown* v. *Forster* (1 Hurlstone and Norman's Rep. 736). The substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso by the amending Act (XVIII of 1872) carries the principle somewhat further than what can be said to be established law in England, but is in conformity with the expressed opinion of several able

[4] The word in brackets was added by section 10 of the Amending Act XVIII of 1872.

Judges. In *Russell* v. *Jackson* (9 Hare's Chancery Rep. 392), *Turner, V. C.*, said :—"I am very much disposed to think that the existence of an *illegal purpose* would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject; because the contriving of a fraud is no part of his duty as solicitor: and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." In *Follett* v. *Jefferyes* (1 Simon's Chancery Rep. N. S. 17), *Rolfe, V. C.*, observed :—"It is not accurate to speak of cases of fraud, contrived by the client and solicitor together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to *all which passes* between a client and his solicitor, but only to what passes between them in professional confidence: and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor." See also *Kelly* v. *Jackson*, 13 Ir. Eq. Rep. 129, and *Queen* v. *Cox and Railton*, L. R. 14 Q. B. D. 153, where the question was discussed and the same principle affirmed.

Object and meaning of the proviso.

Can the barrister, attorney, &c., be asked whether the communication was or was not made in furtherance of an illegal purpose? "It seems," says Mr. Taylor, "that the legal adviser *cannot be asked* whether the conference between him and his client was for a lawful or an unlawful purpose; though if from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project." (§ 833: § 912, 8th edn.) Having regard to section 132, *post*, and to the general tenor of the whole Act, it may be doubtful whether an answer to the question would not be compelled in India.

The above section only mentions *barristers, attorneys, pleaders, and vakils*. It may be a question how far the privilege will extend to so-called legal practitioners in this country, who do not fall within the above enumeration. That *mukhtiars* are not within the rule was decided by the Calcutta High Court under section 24 of Act II of 1855; and the reasons given for the decision equally apply to the language of the present section (*Queen* v. *Chandrakant Chakravarthi*, 1 B. L. R. A. Cr. 8: and see 9 W. R. Cr. Let. 10). The protection is in England extended to all the necessary organs of communication with the legal adviser, *e.g.*, interpreters, intermediate agents, attorney's town or local agent or clerk, foreign counsel, and even to a gentleman sent out to India to act as a solicitor's agent in collecting evidence respecting a pending suit. Some of these are expressly declared to be within the rule in India by section 127, *post*, *q.v.* Medical men, clergymen, clerks, bankers, stewards, and

Who are within the rule.

confidential friends, even an attorney friend, when consulted as a *friend* and not as an *attorney*, are, however, not within the rule. But where a person was consulted confidentially under the erroneous impression that he was an attorney, it would seem that the privilege attached.

Where an attorney, in violation of his duty, communicated the contents of an instrument entrusted to him, this secondary evidence was received after notice to produce the original had been duly given; and it has been several times laid down in England that the mere fact of papers and other subjects of evidence having been *illegally taken* from the possession of the party against whom they are offered, or *otherwise* unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue; for the Court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.

Where the same attorney is employed by two parties, the test is—"was the communication made by the party to the witness in the character of his own *exclusive* attorney?"—If it was, the bond of secrecy is imposed on the attorney called as a witness; if it was not, the communication will not be priviteged. If an attorney, acting for both parties, has an offer made to him by the one for communication to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party. But if an attorney, acting for one party, by the direction of his client, makes a proposal to the opposite party, though he may be compelled to disclose what he stated to that party, he cannot divulge what his own client communicated to him. Thus, in *Memon Haji Harun Mahomed* v. *Abdul Karim*, I. L. R. 3 Bom. 91, in which the defendants, at an interview at which the plaintiff was present, had admitted their partnership to their attorney who was then also acting as attorney for the plaintiff, and it was held that the attorney was not precluded from giving evidence of this admission to him (1) because the word "disclose" in section 126 of The Evidence Act shows that the privileged communication must be confidential or private, and the defendant's statements having been made in the presence and hearing of the plaintiff could not be deemed confidential or private, and (2) because what was said by the defendants to the attorney did not appear to have been mentioned to him exclusively in his character of attorney of the defendants, but was addressed to him quite as much in his capacity of attorney for the plaintiff.

The protection does not cease with the termination of the suit or business in which the communication was made, nor yet with the death of the client. *The seal of the law remains for ever*, unless removed either by the party himself, or perhaps by his personal representatives after his death (see the *Explanation* to the section). Where, however, the client who made the communication is dead, and the litigating parties both claim under him, it would be obviously unjust to determine that the privilege shall belong to the one claimant rather than to the other. Either of them, therefore, can call the attorney as a witness. Other exceptions, which have been recognized by English law, are—where the knowledge was not acquired by the attorney *solely* by

Exceptions to the rule.

his being employed professionally, but was in some measure obtained by his *acting as a party*, more especially if the transaction were fraudulent;—where the communication was made *before* the attorney was employed as such, or *after* his employment had ceased;—where it had no reference to professional employment;—and all cases in which the attorney was acting not as such, but in some other character, as, for instance, in that of a subscribing witness. There is also no privilege where *unnecessary communications* have been made by the client. A prosecutor's attorney was allowed to state that his client mentioned to him that he would give a large sum to have the prisoner hanged. An attorney or other legal adviser may also be called to prove his client's handwriting, or to identify him as the person who verified a plaint or executed a mukhtarnámá or vakálatnámá; but he cannot be asked whether a document entrusted to him was duly stamped or had an erasure upon it.

Privilege of client.

The privilege is that of the client: he may *expressly* waive it, or he may do so by calling the barrister, pleader, attorney, or vakil as a witness, and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege by giving evidence in the suit *at his own instance*, or if he be compelled to give evidence at the instance of another party (section 128). It will be observed that section 126 applies *only when the barrister, pleader, attorney, or vakil is the person interrgated*. Section 129 applies *where the client is interrogated*, and whether such client be *a party to the case* or not.

Mr. Taylor remarks that "*the rule of protection was for many years laid down in less broad terms, where the client himself was the party interrogated.* It was, indeed, long since established that, in that event, all communications between the solicitor and client, whether pending and with reference to litigation, or *made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation*, though not in contemplation of, or with reference to, that litigation, were protected: as also were communications made respecting, the subject-matter in question pending or in contemplation of litigation on the same subject with other persons, with the view of asserting the same right. If, however, communications pass between a client and solicitor *before any dispute had arisen* between the client and his opponent, the opponent could compel the client by a bill in equity to disclose these communications, although they related to matters which formed the subject of the suit, except so far as they contained mere legal advice and opinions"—(§ 845; § 924, 8th edn.). Mr. Taylor goes on to add that this doctrine was propounded in the case of *Radcliffe* v. *Fursman*,[5] by the House of Lords, at a time when the subject of professional confidence was not developed to the same extent as it is in the present day: but although that decision was afterwards disapproved of by almost every Judge under whose notice it was brought, and its principle

[5] 2 Brown's Parliamentary Cases, 514.

was more than once successfully exposed and refuted, it was still reluctantly followed till the year 1873, when Lord Chancellor Selborne had the hardihood to set it at nought in the important case of *Minet* and *Morgan*. L. R. 8 Ch. App. 361 (§ 846; § 925, 8th edn).

The question does not properly arise under this Act, section 129, of which, *post*, lays down the fair and reasonable rule that the client shall not be compelled to disclose any confidential communication which has taken place between him and his legal professional adviser *unless he offers himself as a witness*, and even then he can be compelled to disclose such communications only as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others. If he do not offer himself as a witness, if he be summoned in the usual way, without his offering himself, his privilege is absolute. In *Munchershaw Bizonji* v. *The New Dhurumsey, S. and W. Company* I. L. R. 4 Bom. 576, the defendants relying on *Radcliffe* v. *Fursman*, endeavoured to make the plaintiff produce a case laid by him before counsel as to one of the matters in question in the suit before the litigation had begun. But *West, J.*, following, *Minet* v. *Morgan*, declined to order the production of the paper.

See, in connection with this section, the *Explanation* to section 23, *ante*, p. 135

Section 126 to apply to interpreters, &c.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

See *ante*, page 582. The extension of the protection to interpreters is particularly important in a country like India, in which there are so many races speaking different languages, and in which the most important portion of the administration of justice is conducted in a foreign language.

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, [pleader,[6]] attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

The client does not "waive his privilege," says Mr. Taylor, "by calling the solicitor as a witness, unless he also examines him in chief to the matter

[6] The word in brackets was added by section 10 of the amending Act, XVIII of 1872.

privileged; and, even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined in chief"[7]—(§ 849; § 927, 8th edn.) Section 128 restores the rule followed in England, contrary to which section 24 of Act II of 1855 had enacted that, if a party to a suit gave evidence therein at his own instance, he should be deemed thereby to have waived his privilege and to have consented to the disclosure by the barrister, attorney, or vakil of any matter which might be relevant.

With reference to the words "*if any party to a suit or proceeding calls any such barrister, &c.*," it may be observed that there was not, under the old law, and is not under the new Act, anything to prevent an attorney or other professional person who is acting as advocate for either of the parties to a suit and pleading the case in Court from being examined as a witness in the same case (*Ramjal Shaw* v. *Biswanath Mandal*, 5 B. L. R. App. 28 and see *Cobbett* v. *Hudson*, 1 Ellis and Blackburn's Rep. Q. B. 11 there referred to). Such a course is, however, regarded with disfavour.

Confidential communications with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

The provisions of The Indian Evidence Act upon the subject of *privileged communications* have been recently rendered more important in consequence of the introduction into the Civil Procedure Code of certain sections providing for *discovery*.

Discovery and inspection of documents.

The provisions of these sections are shortly as follows. Section 129 enacts that the Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit, may, at any time before the first hearing, apply to the Court for a like order. Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce together with the grounds of such objection. Section 130 enacts that the Court may order the production before it of all such documents, and that it may deal with such documents when produced in such manner as appears just. Section 131 enacts that any party to a suit may, at any time before or at the hearing thereof, give

[7] On this point see section 138, *post*, and the note thereto.

notice through the Court to any other party, to produce any specified document for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof. No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice. Finally, section 136 enacts that, "if any party fail to comply with any order under this chapter to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered: and the party interrogating or seeking discovery, production, or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly.

As has already been pointed out (*ante*, p. 584) that it is now immaterial whether the communications which have passed between a person and his legal advisers have taken place during the pendency of a litigation or before such litigation had began, as in either case they are protected. This was decided, in this country, in *Munchershaw Bezonji* v. *The New Dhurumsey S. & W. Company*, I. L. R. 4 Bom. 576, in which case it was contended for the defendant that even if the case submitted by the plaintiff to his Counsel could not be used in evidence under section 129 of The Evidence Act, yet the defendant was entitled to have inspection of it under section 130 of the Civil Procedure Code. This contention was, however, disallowed by *West, J.*, who, on this point, made the following observations:—

"The argument that albeit the document may not be such that the Court can properly order its production as evidence, yet the opposite party may demand a perusal of it, is, I think, opposed to all principle. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation. Here the document which the plaintiff is asked to produce is in its nature a confidential communication. The plaintiff wanted advice for his personal guidance in fulfilling a contract of service. The statement which he laid before Counsel with this view, is his own property in substance as well as form, it not being suggested that the consultation was in furtherance of any fraud. I do not find it necessary to compel a disclosure of it, in order to explain the evidence given by the plaintiff, and in the absence of such necessity it would be wrong to put pressure on the plaintiff. It is obviously desirable that communications with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to . . . . . Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point that it would lead to frequent falsehoods as to what had really taken place. The rule of protection seems to me to be one which

should be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise, and disclosures made under section 129 should not be enforced in any cases except where they are plainly necessary. decline, therefore, to order the production of the paper."

It will be observed that, under the terms of this section, it is only communications which have passed between a person and his legal profession a adviser that are privileged. It has been for a long time a moot point in England as to whether the production of communications which have passed between a person and others than counsel or solicitors on the subject of a future or pending litigation can be enforced. The rule in England is now the same as in this country, but it will be useful to refer to some of the English cases on this subject.

English cases illustrating principle of discovery.

In *Goodall* v. *Little* (20 L. J. Chancery, 132) plaintiffs, assignees of a bankrupt firm at Teneriffe, filed their bill against the defendants, three brothers, one of whom managed the business of the Teneriffe firm, for an account of certain remittances forwarded by the manager of the Teneriffe firm to his brother as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the moneys in the hands of the agent of the Teneriffe firm were attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Teneriffe firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors with a view to the litigation in this suit, were not privileged. *Lord Cranworth, V. C.*, said:—"On the question whether the defendants are entitled to withhold production on the ground of the documents being privileged, I shall act on the doctrine as laid down by Lord Lyndhurst in *Hughes* v. *Biddulph*. There, in answer to a motion for production of documents, an affidavit was made by the defendant that many of the papers and letters were communications which had passed between her and her country solicitor, Mr. D., or her town solicitor, Mr. W., or between Mr. D. and Mr. W. Upon a motion for production, Lord Lyndhurst stated his opinion to be, that confidential communications between the defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; and he accordingly made an order for production of all except such as the defendant should by affidavit bring within such an exception." He then proceeded to point out that, in applying this

Goodall v. *Little*.

rule to the case before him, it was to be observed that the letters were all written *either pending or in contemplation of the litigation in the suit*, and with reference to the matters brought into controversy therein; that this clearly brought them within the rule of privilege so far as their subject-matter was concerned, and the only question then was whether they passed between parties and under circumstances to which the privilege was applicable. He then classified them under three heads: (1) letters to the defendant William from his solicitor; (2) letters from the attorney in the Lord Mayor's Court to the solicitors of Archibald; (3) letters from James at Teneriffe to William, written for the purpose of their being communicated to the solicitor of the defendant William, with a view to his defence. The first and second classes were held privileged. The third class was held not to be privileged. "The letters in that class," said the Vice-Chancellor, "are letters from one co-defendant to another, and it is quite unimportant that they were written with a view to enable the party to whom they were addressed to consult his solicitor upon them. That which might pass between William and his solicitor, on the subject of those letters, would be protected; but there is no protection as to letters passing among parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they are sent to communicate them in professional confidence to the solicitor. This case is clearly distinguishable from *Steele* v. *Stewart* (1 Phil. 471), where Lord Lyndhurst held that letters sent from India to the defendant in order to be laid before his solicitor were protected. That decision proceeded on the ground that the person who wrote the letters was an agent of the solicitor sent out to procure evidence, and his letters were therefore in the same position as letters from the solicitors themselves would have been in."

Chartered Bank v. *Rich.*

In *The Chartered Bank of India, Australia and China* v. *Rich* (4 B. & S. 73; 32 L. J. Q. B. 300), which was an action for alleged breaches of an agreement between a banking company carrying on business, amongst other places, at Bombay, and the defendant, who had been their agent there, an order was made under *The Common Law Procedure Act*, 1854, 17 & 18 Vict. cap. 125, s. 50, for discovery of documents relating to the matter in dispute. The secretary of the plaintiff's banking company made an affidavit stating that the letters specified in the schedule attached to the defendant's affidavit consisted of communications between the head office of the plaintiff's bank in London and their offices at Bombay, not forming part of the *res gestæ*, but written after the defendant had left the service of the bank and the dispute in question in the cause had arisen; being on the one part instructions given and inquiries made with the view of obtaining the information required to enable the plaintiffs to decide as to the mode of proceeding against the defendant, several of them having been written under the immediate direction and advice of the attorney for the plaintiffs; and, on the other part, their officers' reports and replies specifying the evidence which could be adduced in Bombay to prove the breaches of contract complained

of; and that the same could not be material to the defendant with a view to establishing his case. The defendant made an affidavit of his belief that this correspondence was material to his defence. It was decided that all this correspondence was confidential communication, and that the defendant was not entitled to inspect it. *Cockburn, C. J.*, said:—"The true doctrine on this subject is clearly and admirably stated by *Pollock, Chief Baron*, in his judgment in *Hunt* v. *Hewitt*[8]—'The right of a plaintiff in equity is limited, *first*, to a discovery confined to the questions in the cause; *secondly*, of such material documents as relate to the *proof of his, the plaintiff's, case on the trial*[9]; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.' . . . . . I find no authority for saying that communications between one of the litigant parties and their attorney or their agent; which are of a confidential character, are to be produced to the opposite party for inspection, simply to enable him to see whether there is anything in the case of his opponent which is inherently weak, or which will enable him to make out his own case." *Blackburn, J.*, said:—"The practice of the Court and of the Judges at Chambers has been to inquire what, from the nature of things and of the facts in the particular case, would tend to further the ends of justice; and looking at all the circumstances, and exercising a sound and rational discretion to order the inspection of those documents which appear to be *material to the case of the party applying*. In the present case all the documents, after a particular date, fall within the principle of communications by an attorney, or matters done by, and communications made through, an agent of the attorney, or of matters which would have been done by an attorney but for the distance of the place occasioning the necessity of employing an agent. But there are several documents written previously to the date at which an attorney was consulted. The plaintiffs, being about to consult their attorney, write out and get from abroad these documents, which are rough notes from which a statement was to be made and laid before him. As to these we have a discretion, and I think we ought not to grant inspection. If I thought that the present case was like *Colman* v. *Freeman*,[1] in which there was a question whether there had been fraud committed by the plaintiffs and their agents in India, I might be of a different opinion."

The case of *Woolley* v. *North London Railway Company* (L. R. 4 C. P. 602) was an action for a personal injury sustained by a passenger on the railway. Inspection was allowed of the following documents:—*viz.* (1) A report of one of the defendants' inspectors to the general manager as to the accident in respect of which the action was brought; (2) a report of the guard of the train to which

Woolley v. *North London Railway Co.*

[8] 7 Exch. 236, 244.

[9] See the principle discussed, and this proposition repeated in *Lyell* v. *Kennedy*, L. R. 8 App. Cas. 217. See also *Bewicke* v. *Graham*, L. R. 7 Q. B. D. 400: *Compagnie Financiere et Commerciale du Pacifique* v. *Peruvian Guano Co.*, L.R. 11 Q. B. D. 55.

[1] 3 H. & N. 871.

the accident happened; (3) a report of the defendant's Locomotive Superintendent to the General Manager as to the accident—upon the ground that they were reports or communications made by the agents of the company in the ordinary course of their duty for the purpose of conveying to the company information upon the subject, and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation. The Court also allowed inspection of (4) a copy of a letter written by the defendants' General Manager to the Secretary of the Board of Trade (pursuant to the and 4 Vic. cap. 97 s. 3) as to the accident; (8) a guarantee (dated seven years before the plaintiff's injury occurred) of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine of the train in which the plaintiff was injured—upon the ground that they might be evidence for the plaintiff, and were not privileged; and (10) so much of the entries in the minute books of the locomotive stores and traffic committee, relating to the accident, as were not entries of communications between the defendants and their legal advisers, or the result thereof. Inspection was, on the other hand, refused of (5) reports to the defendant's Locomotive Superintendent from scientific men consulted by or on behalf of the defendants with reference to the cause of the accident; and (7) a report to the defendants' attorneys from one of the scientific men consulted on behalf of the defendants with reference to the cause of the accident—upon the ground that they were privileged. *Byles, J.*, said:—"Where reports of this kind are made in the course and as part of the duty of the officer, whether an action is pending or not, and whether it contains facts or opinions, they must be produced; but if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged. *Brett, J.*, said:—"It seems to me that the rule may be thus stated: Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation,[2] is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is, whether it is made in the ordinary course or the duty of the servant or agent, or for the instruction of the master of principal as to whether he should maintain or resist litigation."

The case of *Fenner* v. *The London and South Eastern Railway Company* (L. R. 7 Q. B. 767) was an action for late delivery and defective condition of cattle carried by the defendants upon their railway for plaintiff.

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[2] *Wheeler* v. *Le Marchant*, L. R. 17 Ch. D. 675: *Nason* v. *Cattley*, L. R. 22 Ch. D. 609.

The documents, of which inspection was sought, were letters and reports which had passed between the company's servants upon the subject of the litigation after the company's manager was aware that litigation was probable. Inspection was resisted on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of, or with a view to, litigation and resisting the plaintiff's claim. It was, however, decided that these documents were relevant to the question in dispute, that they fell within the general rule as to a litigant being entitled to a discovery of all the documents in his adversary's possession relevant to his case, and that they were not privileged as falling within any of the exceptions. *Blackburn, J.*, said:—"There is no doubt that, on grounds of public policy, the communications between a person and his solicitors and counsel, with a view to obtain legal assistance and advice, are privileged; and, so far as the communications made with a person not himself a solicitor can be considered as made with him as deputy to the solicitor, they are also privileged (*Steele* v. *Stewart*),[5] and this, I apprehend, is a positive right of the client which the Court cannot deprive him of. But when the communications are made with a person not in any way connected with the legal advisers of the defendant, the question is one of much more difficulty. In the case of *Greenlaw* v. *King*,[4] Lord Langdale went so far as to order the inspection of the correspondence between the defendant and a gentleman called Leigh, who had been his late father's solicitor with respect to the matters in controversy, and who continued to act as the agent and adviser of the defendant, though not as his solicitor, giving as his reason 'they are communications which have taken place between the defendant and Leigh, not in his character of solicitor, and it cannot be said that a mere friend is a person so confidential that a communication with him is privileged.' This is certainly a strong authority for this proposition, that the Court has power to order such an inspection; and accordingly a Court of Common Law has, in cases where it was of opinion that justice required such an inspection, ordered it (*Colman* v. *Trueman*;[6] *Baker* v. *London and South-Western Railway Company*).[6] But it has been held that a Court of Common Law, at least, has not a mere ministerial duty to order an inspection of documents admitted to be relevant and not brought strictly within the privilege of professional advice (*Chartered Bank of India* v. *Rich*);[7] and this was acted upon in *Woolley* v. *North London Railway Company*,[8] in which case the Court ordered the inspection of those reports which they thought, though made after litigation, were not in the nature of proofs for the trial, and refused the inspection of the reports of the scientific witnesses, which they thought were of that nature. It

Fenner v. London & S. E. R. Co.

[5] 1 Phil. 471.
[4] 1 Beav. 137.
[5] 3 H. & N. 871: 28 L. J. (Ex.) 5.
[6] L. R. 3 Q. B. 91.
[7] 4 B. & S. 73: 32 L. J. (Q. B.) 300: *ante*, pp. 589—590.
[8] L. R. 4 C. P. 602: *ante*, pp. 590—591.

is obvious that whenever—to borrow the language of *Willes, J.*, in *London Gas Company* v. *Chelsea**—'the case comes very near the dividing line at which the province of discovery ceases,' there is chance that different minds may come to opposite conclusions as to how the judicial discretion should be exercised. *The principle, however, I think, to be derived from all the cases is*, that where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection. Where the documents fall short of that, it should, as a general rule, be granted."

English v. *Tottie.*

In an action for not delivering goods according to contract, the defendant, before selling the goods to the plaintiff, had purchased them from a certain company. Shortly before the commencement of the action two letters from the plaintiff's solicitors relating to the claims made in the action had been sent by the defendant to this company's agents with a request that they would obtain information respecting these claims; and thereupon a number of letters passed between such defendant and such agents, some of them after the action was brought. As a result of this correspondence, the defendant received a large compensation from the company. It was held that this correspondence did not come within any of the Exceptions, and that plaintiff was entitled to inspect it. *Cockburn, C. J.*, said:—"I think it just and reasonable that the plaintiff, as far as possible, should be put in possession of all the facts of the case; and, if this information is in the breast of the defendant, it is right that it should be disclosed. The plaintiff could obtain this information from the defendant by cross examination at the trial; and then, if necessary, apply to have the trial postponed; but this would be obviously inconvenient: or perhaps he could obtain it by interrogatories, but it is very undesirable that he should only be able to learn by long interrogatories what he could at once find in the correspondence itself. This correspondence may probably not be legal evidence, but the facts which it contains are facts which may probably be evidence and which ought to be brought to the knowledge of the plaintiff." *Blackburn, J.*, concurred, remarking:—"The general rule as to the discovery of documents is laid down in *Fenner* v. *London and South Eastern Railway Company*, that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to the exceptions: *first*—which is an exception by right—of communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice; and *secondly*—an exception which is in the discretion of the Court to allow—of communications made with a person not himself a solicitor, but which can be considered as made with him as deputy for a solicitor. Now the Courts of Exchequer and Common Pleas, in the exercise of this discretion, have gone further than this Court in refusing applications for inspection, and it is not for me to say which course is right.

* 6 C. B. (N. S.) 411: 28 L. J. (C. P.) 257.

But in the present case the correspondence is in no sense the work of an attorney. It consists of independant communications with third persons, which ended in the defendant receiving large compensation, and I do not see why the plaintiff should not see them. Whether, under the new practice, we have a discretion to refuse inspection in cases where a Court of Equity has been in the habit of granting discovery, is a point which we need not decide at present, but which may probably at some time come before the Court of Appeal. It is enough to say that the present case is not brought within any of the Exceptions which have hitherto been allowed" (*English* v. *Tottie*. L. R. 1 Q. B. 140).

When the defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained in an accident on the defendants' line of railway, sent their medical officer, before litigation commenced or was formally threatened, to report to them upon the nature of the plaintiffs' injuries, it was held that the reports of such medical officer were privileged, and that plaintiffs were not entitled to have inspection of them (*Cossey and wife* v. *The London, Brighton and South Coast Railway*, L. R. 5 C. P. 146, distinguished from *Baker* v. *London and South-Western Railway Company*, L. R. 3 Q. B. 91). *Bovill, C. J.*, said:—"Complaint had been made to the company, and the investigation took place with the view of compensating the plaintiffs. I think the facts clearly bring the case within *Chartered Bank of India* v. *Rich* and *Woolley* v. *North London Railway Company*, which protects the party against the production of documents which are obtained with a view to impending litigation. . . . . The general rule is not confined to cases where litigation has actually been commenced or to communications between the party and his legal advisers." *Montague Smith, J.*, said:—"The question is, whether the limitation to the right to have discovery and production of documents on the ground that they were obtained with a view to litigation or impending litigation applies to the reports in question and I think the reports are within the limitation, and that we ought not to order the production of them: the principle of the limitation will be found in the judgments of all the Judges of this Court who took part in the decision of *Woolley* v. *North London Railway Company*; and, to avoid a change of words, I refer to what I said in that case. I said as to the documents which the Court there held ought to have been produced, *viz.*, 'reports made by certain officers of the company in the ordinary course of their duty—'I think we may fairly infer that these reports would be made whether there was any cause of action or not;' and I then stated that I understood the limitation to the right to be that, if the documents are procured for the purpose of assisting the party in an impending litigation, and to obtain advice, they are not to be produced; and I then referred to *Reid* v. *Langlois*[1] and *Steele* v. *Stewart*,[2] which show that, if the information is obtained not by, though

Cossey v. London & Brighton Railway Company.

[1] 1 McN. & G. 627. [2] 1 Phil. 471.

for, the attorney of the party, it is privileged from production. To those two cases in Chancery I may now add the recent case of *Ross* v. *Gibbs*.[3] In that case, *Stuart, V. C.*, says:—'The privilege which exempts a communication from production is the privilege of the client and not of the solicitor; and communications relating to the subject-matter of the suit, and furnished with a view to litigation, are as much protected upon principle when made by a lay agent to a litigant, as they are when made by a solicitor. I account for the frequent reference to the solicitor in the authorities to his being treated as the person who conducts the litigation; but in reality it is the plaintiff who conducts the litigation, though he conducts it through his solicitor.' The Vice-Chancellor, in this passage, places the principle of the privilege on broad, intelligible, and, I apprehend, sound grounds: and I confess I think this limitation to the general right to require production ought in its application to be liberally construed in favour of the limitation. Now the documents in question seem to me clearly to fall within the limitation. They are the reports of a medical man sent by the defendants to examine the plaintiffs not only after the cause of action had arisen, but after a claim had in effect been made, and when the defendants were in immediate peril of an action and for the sole object of reporting his opinion on the subject-matter of the claim for the guidance of the defendants and their legal advisers. I confess I can draw no other inference than that this report was obtained with a view to impending litigation, and for the purpose of assisting the defendants and their advisers in dealing with it; and, that being so, I think we ought not to order the production. We were pressed with the decision of the Court of Queen's Bench in *Baker* v. *London and South-Western Railway Company*.[4] I should be sorry to decide in opposition to the judgment of a co-ordinate Court, but the circumstances of that case differ from those of the present. There, two persons, a medical man and an attorney's clerk, were sent to negotiate a settlement of the claim, which settlement was afterwards impeached. It was not contended in that case, in opposition to the production of the documents, that they were obtained with a view to impending litigation; but the case was argued on other grounds. It is not necessary to say how far the ground of decision in that case ought to prevail: but it seems to me that it does not govern the present case, where the object of the examination was such as I have before pointed out. It may be observed that plaintiffs need not consent to such a medical examination as took place in this case, if they do not think it expedient, and may impose terms on their assent, as, that they shall be permitted to see the report and opinion of the medical man. But if without any terms the examination is made, as in this case, with a view to advice or evidence in litigation, it seems to me that the protection from discovery is not displaced by the mere fact that the plaintiff consents to be examined."

In *Skinner* v. *The Great Northern Railway Company* (L. R. 9 Ex. 298), inspection was claimed of two reports made to the defendants by their

[3] L. R. 8 Eq. 522, 524: 39 L. J. (Ch.) at p. 63. [4] L. R. 3 Q. B. 91.

medical officer upon examining plaintiff after a claim for compensation had been made and in consequence of that claim, but before any action had been commenced or any communication made by the plaintiff's attorney. It was contended that, under the rule laid down in *Fenner* v. *London and South-Eastern Railway Company*—*viz.*, that a document is not privileged unless it is in the nature of instructions for a brief, inspection of these reports ought to be allowed. *Bramwell, B.*, said:—"We have to choose between the decision of the Queen's Bench[5] and that of the Common Pleas,[6] and we follow the latter,[6] which is in conformity with the practice of this Court." *Pigott, Cleasby and Amphlett, BBB.*, concurred.

Skinner v. Gt. N. Ry. Co.

In *Malden* v. *Great Northern Railway Company*[7] the plaintiff, in an action for personal injuries sustained on the defendants' line, was attended by Mr. S., at whose suggestion Mr. J., the medical officer of the company, was called in. Mr. J., having met Mr. S. in consultation on three occasions, made reports to the company on the 20th November and 5th December. At the company's request, Mr. E. examined the plaintiff in conjunction with Mr. J. and Mr. S. and sent a short report to the company on the 5th January, signed by all three. On the 6th January, Mr. E. made a further and more detailed report signed by himself alone. At this time no claim had been formally made, but it was understood that the company were responsible to the plaintiff. On the 10th April another consultation was held between Messrs. S., J., and E., and a report was sent the same day to the company by Mr. J. It was held that the reports of the 20th November, 5th December and 5th January were not privileged, and that plaintiff was entitled to see them. The report of the 6th January was waived, and that of the 10th April, after being inspected by the Court, was held to be privileged. *Blackburn, J.*, said:—"We adhere to the principles we laid down in the case of *Fenner* v. *London and South-Eastern Railway Company*;[8] the difficulty is in the application of those principles. . . . . Now we are agreed upon this, that, if a medical man is sent down to examine a patient and to report to a company, and it is done with such a warning to the patient's friends, who are acting for him in the matter, or to his attorney, if he has one—if it is done under such circumstances that there is a contract actually made that the doctors are to come and see the man, and have a fair examination and report to the company, and that report is to be for their guidance, and is confidential—then, undoubtedly, we should not order them to produce it: and where the circumstances are such, from the plaintiff's attorney being concerned in it, that it may be implied, although not expressly said, that such an

Malden v. Gt. N. Ry. Co.

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[5] *i.e.*, *Fenner* v. *London and South-Eastern Railway Company*, *ante*, pp. 591, 592.

[6] *i. e.*, *Cossey* v. *London, Brighton and South Coast Railway Company*, *ante*, p. 594.

[7] Before the Queen's Bench, though reported at L. R. 9 Ex. 300.

[8] L. R. 2 Chan. Div. 641; 35 L. T. Rep. N. S. 75.

agreement was understood, I should say the same thing. The difficulty of implying an understanding is considerable, unless there is an attorney concerned in the matter, who would know what was the usual practice; and if the company choose to let it rest on an understanding and implication, they must run the risk of having litigation to see whether it is implied or understood."

In *Anderson* v. *The Bank of British Columbia*,* the manager of the London establishment, observing litigation imminent, telegraphed to the manager at Oregon, North America, to send by letter the fullest particulars of the whole transaction. In answer to this telegram the English manager received a letter for which the defendants claimed privilege, on the ground that it was a communication in reference to the subject-matter of the litigation, made by a third person to enable the defendants to prepare their defence to the litigation then in anticipation. The Master of the Rolls held that the letter was not a privileged communication, and ordered it to be produced; and this order was confirmed by the Court of Appeal. *James, L. J.*, "said that reference had been made to the cases at law in which, as it was stated, a different rule had been adopted. But those cases were to be looked at with regard to their special circumstances, and they all seemed to be based upon this principle, that you had *no right to see your adversary's brief, and no right to see the materials for his brief.* As between principal and agent, it was the duty of the agent in the ordinary course of his business to give his principal the fullest information without reference to litigation. If, even after the bill was filed, the defendants had telegraphed for information, the Court would have told the defendants that it was their duty to get all the information they could, and, when got, to discover what it was. The knowledge of the agent was the knowledge of the principal, and upon these grounds the order of the Master of the Rolls would be affirmed and production by defendants of the letter in question ordered." *Mellish, L.J.*, "said that the question to be decided was, whether a letter from the agent abroad stating what he had done for his principal in a particular transaction, was privileged, because the information was given to the principal after the threat of litigation in respect of the transaction. He was clearly of opinion that such information was not privileged, as it related to matters which the agent had done for or on behalf of the principal, which were really the acts of the principal himself. If a party to litigation was entitled to obtain discovery from the principal by interrogatories and by an order for the production of all documents in his possession, he must equally be entitled to get discovery from the agent of information sent by him to his principal. If such information were allowed to be privileged, a principal, when interrogated as to particular business which had been transacted in his office, might shelter himself by saying, 'I don't know it

Anderson v. Bank of British Columbia.

* L. R. 2 Chan. Div. 644: 3 N. T. Rep. N. S. 75.

of my own knowledge.' 'All I know is derived from what my clerks told me, and, as what they told me was told after litigation had been threatened, their communications are privileged.' The result would be to deprive parties of all benefit of the discovery to which they were entitled. Moreover, if both parties, whether plaintiffs or defendants, were bound to discover whatever information they had received from their agents, the course of litigation would be much facilitated and the trouble and expense of sending out a commission—in this case to Oregon—to examine the books and get at the information on the spot, would be saved."

In *Facey and wife* v. *The London Tramway Company* (L. R. 2 Ex. 440, n.: 46 L. J. Ex. 698), the plaintiffs sued for an injury to the wife caused by an accident on the tramway; they brought their action in the Exchequer Division and applied at Chambers for an order to inspect a report of a surgeon, who had seen the injured party. This was refused in accordance with the Exchequer decisions on the subject, and notwithstanding the opposite rule followed by the Queen's Bench and Common Pleas Division. The plaintiffs appealed against the order of refusal, which was, however, confirmed, *Cockburn, C. J.*, saying that, in an Exchequer cause, they were bound to follow the decision of the Judges of the Exchequer Division.[4]

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The conflict of decision between the Divisions of the High Court of Justice terminated, however, with the case of *Bustros* v. *White* (L. R. 1 Q. B. Div. 423: 34 L. T. Rep. N. S. 835), which finally decided that a Judge has no discretionary power to refuse discovery except on the ground of privilege, and which is also an important authority as to what documents are privileged. The plaintiff in this case was the consignee of a cargo of seed shipped at Alexandria and discharged at Newcastle. He complained that the seed had arrived in bad condition; and he sued the owner of the ship in which it was carried for causing the damage by neglect of proper care in packing. The ship-owner alleged that such damage arose from the seed being shipped in a bad state. The plaintiff had had some correspondence with his agent at Newcastle, and also with a house at Alexandria, on the subject of the cargo, and the defendant desired that this correspondence should be produced, making the usual affidavit for the purpose, that he believed it would be "material for his defence to the action," according to the terms of the rule under the Judicature Act, which is substantially in

Bustros v. White.

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[4] See also *Friend* v. *The London, Chatham and Dover Railway Company* (36 L. T. Rep. N. S. 7[illegible]), decided after *Bustros* v. *White*. Here the plaintiff commenced an action against a railway company to recover damages for injuries sustained whilst travelling on their line. With the plaintiff's consent the company's doctor saw and examined the plaintiff, and made a written report to the company's solicitor. On the plaintiff claiming inspection of the report, the defendants' solicitor made an affidavit (which the plaintiff did not answer) that *the doctor was sent, and his reports procured by the solicitor* to be used as evidence for the defendants at the trial. Held by the Court of Appeal (affirming the decision of the Exchequer Division, *Pollock* and *Huddleston, BB.*), that the report was privileged, and the plaintiff not entitled to inspect it.

accordance with the enactment in *The Common Law Procedure Act* of 1854. A Judge at Chambers, looking at the letters and thinking that they did not so much contain facts as opinions, declined to make the order for production; and this was confirmed in the Queen's Bench Division. The defendant, who desired the production of the letters, appealed, and the question was argued before a full Court of eight Judges. The Master of the Rolls proceeded to deliver their unanimous judgment, that the correspondence must be produced. The Judicature Act, they said, only re-enacted the provision of *The Common Law Procedure Act*, which was absolute in its terms, and did not preclude a party from resorting to a Court of Equity for discovery in any case in which the production of the documents was not protected as professionally privileged, which they considered was not the case here. Rule 12 of Order XXXI is a reproduction in a slightly altered form of section 50 of *The Common Law Procedure Act*, 1854, under which it was held that the Judges had a discretionary power to refuse discovery in cases other than those of privilege. Rule 11 of the same Order reproduces section 18 of The Chancery Amendment Act, 1852 (15 & 16 Vict. cap. 86), which empowered the Court to make an order for the production by any defendant upon oath of such of the documents in his possession or power relating to the matters in question in the suit as the Court thought right. Under this section, it was thought that the Court had no discretionary power, and that, if the documents were material to the plaintiff's case and could not be brought within the rules as to privilege, they must be produced *ex debito justitiæ*. The question then was whether the Common Law practice of *discretion*, or the Chancery practice of *no discretion*, was to prevail: and the Judges held that they were bound by the directions contained in section 25, sub-section 11 of The Judicature Act, 1873, which enacts that, in all matters not thereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail. It was true that some part of the correspondence took place after the action was commenced; but it did not come within the rule of privilege applying to professional confidence, which *only applied to inquiries instituted by or under the direction of professional advisers*: nor was it enough to object that the correspondence might, perhaps, be injurious to the other party at the trial before a jury, or that it contained rather expressions of opinion than statements of facts. On this point it was said:—"There is nothing that brings the matter of opinion within the rules as to professional or *quasi*-professional privilege; and by *quasi*-professional privilege I understand this to be meant—that the advice or communication may be protected when it does not proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or even by the client on his recommendation." In concluding their judgment, the Court thought it right to make some observations upon the practice, which they had found to prevail at Chambers, of the Judge looking at the papers, production of which was desired. Without saying whether this practice was improper,

the Court thought it right to say that, if the papers were thus produced to the Judge, the party could not be permitted to appeal against the order.

The case of *Bustros* v. *White* is now regarded as the leading case upon the subject of discovery under the new practice in the Supreme Court of Judicature in England;[2] and has been followed in this country in the case of *Wallace* v. *Jefferson*, I. L. R. 2 Bom. 453. In this case, *Sargent, J.*, observed: 'In *Bustros* v. *White*, it was decided by a Court of Appeal consisting of eight Judges that, under Order XXXI, Rule 11 of the English Judicature Act, a Judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in question, provided the documents are not privileged. Section 130 of the Civil Procedure Code would appear to have been copied from the above rule, and we think, therefore, it is advisable to adopt the English ruling as to its construction. As the defendant's affidavit admits that the documents in question relate to the matter in dispute, the only question to be determined is whether they are privileged. They consist of two or three telegrams and letters, all of which passed between the plaintiffs in London and Mr. Richardson who manages their business in Bombay. It was said that they were confidential communications between principals and their agents. But the mere circumstance that communications are confidential does not render them privileged as pointed out by the Master of the Rolls in *Anderson* v. *Bank of British Columbia*. They must be, to use his words, confidential communications with a professional adviser, and this view of the law was confirmed by the Court of Appeal consisting of Lords Justices James and Mellish. Nor would it be possible, having regard to the position in which Mr. Richardson stood to the plaintiffs, to treat him as a deputy of the solicitors in Bombay, even

Indian cases illustrating principle of discovery.

[2] See also following cases:—*Minet* v. *Morgan*, 28 L. T. Rep. N. S. 573 *Mostyn* v. *The West Mostyn Coal and Iron Company*, 34 L. T. Rep. N. S. 531; *Johnson* v. *Smith*, 35 L. T. Rep. N. S. 741; *Friend* v. *The London Chatham and Dover Railway Company*, L. R. 2 Excheq. 437; 36 L. T. Rep. N. S. 729; *Martin* v. *Butchard*, 36 L. T Rep. N. S. 732; and *Southwark and Vauxhall Water Company* v. *Quick*, 38 L. T. Rep. S. N. 28. The last four of these cases were decided after *Bustros* v. *White*. In *Southwark and Vauxhall Water Company* v. *Quick*, which was affirmed by the Court of Appeal, the documents of which inspection was sought were: (1) transcript of shorthand notes of a conversation between a chimney sweep employed by the company and their engineer: (2) transcript of notes of conversation between the chairman and the engineer of the company; and (3) statement of facts drawn up by the chairman. All these documents had been prepared with the object of laying them before the solicitor of the company, but it so happened that the memorandum which resulted from the conversation with the chimney-sweep had not in fact been so laid before him. It was held that all these documents were privileged. *Cockburn, C. J.*, remarked that none of the previous decisions was precisely in point, that these documents were all framed with the object of obtaining the opinions of the solicitor upon them, and that he did not see that any distinction could be drawn between documents prepared at the instance of the solicitor and documents drawn up for him by his clients spontaneously. Where an action by A against B gave rise to an action over by B against C, the correspondence between the solicitors of A and B was held privileged from inspection by C (*Bullock* v. *Corrie*, 38 L. T. Rep. N. S. 102).

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the plaintiffs had at that time been in communication with professional advisers, which does not appear on the affidavit to have been the case. Lord Justice Mellish in the case of *Anderson* v. *Bank of British Columbia* suggests that the privilege may perhaps extend to cases in which an agent as distinguished from a solicitor is employed in communicating evidence to be used at the trial. But it is not suggested that the letters from Mr. Richardson were of that nature. The documents, as shown by Mr. Richardson's affidavit, are of the same nature as those of which production was ordered in *Anderson* v. *Bank of British Columbia*. Production must be ordered." Similarly, in *Bipro Das De* v. *Secretary of State for India*, I.L.R. 11 Calc. 655, which was a suit for moneys claimed in respect of certain commissariat contracts, it was held that letters written by the defendant's servants to each other in respect of the subject-matter of the suit, were not privileged. In this case it was said: "The letters of which production is sought were a letter by Major Thomas to Major Hallett, and Major Hallett's reply to it; the first being a letter written for the purpose of giving Major Hallett information with a view to possible future litigation. It does not appear that it, or the reply to it, was written for the purpose of being communicated to any solicitor. It is consistent with the terms of the affidavit that both letters were written without any such purpose; but that they were of such a nature that they might in the event of litigation be communicated to the solicitor. This does not show enough to entitle the documents to protection. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him to prosecute or defend an action, as *Cotton, J.*, at p. 322, or as *Brett, L. J.*, at p. 320, in the case of the *Southwark and Vauxhall Water Co.* v. *Quick*, L. R. 3 Q. B. D. 315, says, modifying the words of *Mellish, L. J.*, in *Anderson* v. *Bank of British Columbia*, "merely for the purpose of being laid before the solicitor for his advice or consideration." . . . . Nor, would it, I think, be enough to protect these letters if they were written with a view to possible future litigation, and with the intention that in that case they should be laid before a solicitor.'

Production of title-deeds of witness not a party.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

See *Beattie* v. *Jetha Dungarsi*, 5 Bom. H. C. O. C. J. 152, for a case in which it was held that the production of title-deeds could not be enforced.

The defendant in this case had a mortgage over certain premises, and had been given the title-deeds of these premises as well as of some other immoveable property belonging to the mortgagor. It was held that on the authorities the defendant could not be compelled to produce his title-deeds before satisfaction of his claim. A person refusing to attend and give evidence is liable for damages under section 26, Act XIX of 1853, apparently still in force in Bengal, the North-West Provinces and Oudh. By section 10 of Act X of 1855, current only in the Presidencies of Madras and Bombay, witnesses failing to produce documents in obedience to a summons are liable for damages in a civil suit.

Production of documents which another person, having possession, could refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

Privilege belongs only to witnesses other than parties.

Sections 130 and 131 may be considered together, section 131 extending to the agent the same protection which section 130 provides for the principal. It will be evident from the words "*No witness who is not a party to a suit*," that the privilege created by section 130 extends only *to witnesses who are not parties to the suit in which they are called*; and all such persons are absolutely privileged from being compelled to produce their title-deeds, &c., unless there be a written agreement for their production between them and the person seeking such production. The principle so enacted is in accordance with the rule of English law. "Upon principles of reason and equity," says Mr. Taylor, "Judges will refuse to compel either a witness or a party to a cause to produce either his title-deeds, or any document the production of which may tend to criminate him, or any document which he holds as mortgagee or pledgee" (§ 428; § 458, 8th edn). The fact that the production of a document will expose the person producing it to a *civil action* affords no ground for protection in England according to the decided cases:[3] and the same rule has evidently been adopted in The Indian Evidence Act, seeing that the above section does not extend the principle of protection to such cases.

Can witness be compelled to give parol evidence of contents?

In England, the same rule which protects title-deeds from production protects also the party justified in refusing to produce them from being compelled to disclose their contents. "It would be perfectly illusory," said Mr. Baron Alderson,[4] "for the law to

[3] *Doe* v. *Date*, 3 Adolphus and Ellis' Rep. 609; *Doe* v. *Lord Egremont* 2 Moody and Robinson's Rep. 386.

[4] In *Davies* v. *Waters*, 9 Meeson and Welsby's Rep. 612; see also *Few* v. *Guppy*, 13 Beav. 454.

say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a round-about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate." The same reasoning and the same rule will, no doubt, be followed in India. Where a barrister, pleader, attorney, or vakil is the person in possession of the document, he is expressly prohibited by section 126, *ante*, from stating the contents. As to the owner of the document and other agents, the Act contains no express provision; but, as section 65, clause (*a*), paragraph 4, admits secondary evidence of the existence, condition or contents of a document, only when *a person legally bound to produce* it refuses after notice to do so, it may appear that neither the owner nor any one else can be called to give secondary evidence of a document which the person in possession of it is not legally bound to produce.[5]

Agents not prohibited from producing.

Section 131 extends not only to professional men, but to trustees, mortgagees, and agents. Having regard to the word 'compelled,' it would appear that these persons will be *allowed* to produce documents which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law. It would seem to follow that, although a barrister, pleader, attorney, or vakil is forbidden (by section 126) to state the contents of any documents with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he choose to do so.

See, in connection with this section, section 162, and the second proviso to section 165, *post*.

Can witnesses being parties be compelled to produce their title-deeds?

With respect to *witnesses who are parties to the suit*, section 22 of the repealed Act, II of 1855, enacted that "a witness being a party to the suit shall not be bound to produce any document in his possession or power, *which is not relevant or material to the case of the party requiring its production*." This provision, though not expressly re-enacted, is, however, in entire conformity with the requirements of the whole Evidence Act. If this principle be followed, a plaintiff, who must succeed on the strength of his own title, not on the weakness of the defendant's, will be prevented from using the law to detect flaws in the title of the latter. Where the defendant is in possession of a document or title-deed material or relevant to the case of the plaintiff, there is ordinarily no protection, and production will be compelled.

[5] If this be so, it is contrary to the rule of English law, which admits secondary evidence of a document in the hands of a stranger, who is not compellable by law to produce it, and who refuses to do so—Taylor, § 427; § 457, 8th edn.

[6] See *Hibbard* v. *Knight*, 2 Welsby, Hurlestone, and Gordon's Rep. 11.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

The provisions of this section are not in accordance with English law under which a witness is excused from replying to any question, the answer to which would have a tendency to expose such witness or the husband or wife of such witness to any kind of criminal charge or to a penalty or forfeiture of any nature whatsoever—a rule which was respected even by Chief Justice Jefferies when it told *against* the prisoner. In Ireland, it has even been decided that, upon a trial for the murder of a person killed in a duel, any person who was present and in any way countenanced the proceeding might refuse to answer any question relating thereto. Under the New York Civil Code, the protection has been restricted to those questions the answers to which would have a tendency to subject to the punishment of *felony*. In England the Legislature has occasionally found it necessary to take away the privilege, or by an act of indemnity to leave no cause for its exercise. The Act relating to combinations by workmen,[7] The Larceny Act, 1861,[8] and the Acts for enquiring into corrupt practices at elections, are examples (and see section 37 of The Madras Police Act, VIII (M. C.) of 1867, which indemnifies witnesses on prosecutions for gaming). But these Statutes differ from the Indian enactment in this, that, under their provisions, the having given evidence is a complete bar to a subsequent prosecution; while the Indian Act does not forbid such a subsequent prosecution, but merely provides that the answer which the witness is compelled to give is not to be the means of subjecting him thereto, and cannot be used against him thereupon. It is clear that it might, however, attract suspicion where none attached before, and so lead to the discovery of *other* evidence sufficient to

Rule of English law different.

[7] 6 Geo. IV. cap. 129, section 6.
[8] 24 & 25 Vict., cap. 96, sections 75—84.

lead to a conviction. Against this, however, may be put the fact that if a witness in England do answer such questions, his replies can be used against him, unless at the time, having claimed the protection of the Courts, he was illegally compelled to answer.

Whether a witness can be compelled to answer a question, the reply to which would *subject him to a civil action or pecuniary loss, or charge him with a debt*, is a question on which the above section is silent.* It was discussed in England in Lord Melville's case[1] and decided in the affirmative by a majority consisting of eight out of twelve Judges. To remove all doubts, however, a Statute was subsequently passed (46 Geo. III, cap. 37) which declared a witness bound to answer such questions if *relevant to the matter in issue*. The New York Civil Code contains a similar provision. In India there can be no reasonable doubt that the same principle should be followed; for, if a man is not protected from answering questions which may subject him to a criminal prosecution, much less should he be protected where the possible consequences of answering are much less serious.

Question must be relevant.

It will be observed that the witness will be *compelled to answer* only when the question relates to "*matter relevant to the matter in issue*." This accords in some respect with a suggestion made in England, and mentioned by Mr. Taylor, that, where the question is material to the issue, it should be left to the discretion of the Judge whether or not he will enforce an answer, having due regard to the general interests of justice: provided always that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates; or, at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness. The Indian Evidence Act, although it gives the Judge no discretion as to the answer being compulsory where the matter is material, confers such a discretion upon him when the question is put in cross-examination and relates to a matter not relevant except as affecting the credit of the witness (see section 148, *post*). In the former case, where the answer is compulsory, it enacts that such answer shall not subject the witness to any arrest or prosecution, or be proved against him in any criminal proceeding, *except a prosecution for giving false evidence by such answer*. The latter words create a very proper exception, and are more accurate than the language of the old section 32 of Act II of 1855, "except for the purpose of punishing such person for wilfully giving false evidence *upon such examination*."

A suit was brought under the summary procedure of Chapter XXXIX of the Civil Procedure Code upon a promissory note executed jointly by A and his son B. Leave to defend was obtained upon an affidavit filed by B, who further gave evidence at the trial on his own behalf. Upon a subsequent trial of B for the forgery of his father's signature to this promissory note,

* The above section (132) is almost *verbatim* the same as section 32 of the repealed Act, II of 1855, which also was silent on this point.

[1] 6 Parliamentary Debates, 167—215.

the affidavit and deposition of B were admitted in evidence against him.

Answers given without compulsion admissible in evidence.

The question whether this evidence had been properly admitted was referred to a Full Bench of five Judges. They held unanimously that the affidavit had been properly admitted. A majority of three further held that the deposition also had been properly admitted, as B had made it *voluntarily but without compulsion on the part of the Court* (*Queen* v. *Gopal Das*, I. L. R. 3 Mad. 271). In this case it was pointed out that having regard to the language of the section—"*A witness shall not be excused*," *&c.*—"No such answer, which a witness shall be *compelled to give*," *&c.*—it would seem that, in order to prevent the answer of a witness from being used against him, it must appear that it was an answer given *under compulsion*. This might appear from the fact that the witness at first objected and afterwards answered only upon being required to do so by the Court. It was added that though it might be said that it was idle for a witness to seek to be excused in a case in which the Court had no power to allow his excuse, yet the answer to this was that the Legislature had shown no intention to exclude voluntary statements made on oath, and that until an objection had been taken by the witness there was no occasion for compulsion on the part of the Court. In *Queen-Empress* v. *Ganu Sonba*, (I. L. R. 12 Bom. 440), it was pointed out that this section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer and gives him a protection in the latter of those cases only. It was, therefore, held that protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which he then has been compelled by the Court to give. The ruling in the case of *Queen* v. *Gopal Das* was followed in the recent case of *Queen-Empress* v. *Samiappa* (I. L. R. 15 Mad. 63), in which a revenue official, who had been convicted of attempting to receive a bribe from certain raiyats subsequently charged the raiyats with having conspired to bribe him, and at their trial their depositions given in the previous case were admitted in evidence against them. It was held that the depositions having been given without compulsion on the part of the Court, and without the raiyats having claimed an indemnity before incriminating themselves, they were admissible in evidence. In this case reference was made to the case of *Manjaya* v. *Sesha Shetti*, I. L. R. 11 Mad. 477, and *Bhikambar* v. *Becharam Sirkar*, I. L. R. 15 Calc. 264: and it was pointed out that all that was decided in the former case was that a witness was not liable to be convicted of defamation on a statement made by him as a witness, and that if the statement was false the remedy was by indictment for perjury, and that in the latter it was only decided that no suit would lie for damages on account of slander uttered by a witness whilst under examination in a judicial proceeding. The Calcutta High Court in *Digambar Haldar* v. *Mohan Sirdar* (Cr. Ap. No. 626 of 1893, decided August 28, 1893), has approved of *Queen* v. *Gopaldas* and *Queen-Empress* v. *Ganu Sonba*. The result of these cases is that a witness is protected against the consequences for what he may say whilst under examination; but if he

wishes to prevent his statements from being used against him as evidence of an offence previously committed, he must object to reply and only answer on being compelled by the Court.

It has been held in England that a Judge is not bound to warn a witness of his privilege to refuse to answer criminating questions; nor will Counsel be permitted to object to such questions, if the witness himself do not refuse to answer.

Two exceptions to rule that witnesses must answer.

It may be observed that witnesses examined by Police-officers investigating cases, which they are by law empowered to investigate, are not bound to answer criminating questions put by such officers (see sections 161 and 175 of the Code of Criminal Procedure, Act X of 1882). Collectors engaged in settlement operations and other proceedings are, by clause 1, section 19 of Regulation VII of 1822, authorized to summon all *sadr malguzars* and other persons owning, occupying, managing, or cultivating lands within or in the vicinity of the *mahal* to which their inquiries extend, and to require the production of their accounts and to examine such persons as to the truth of such accounts; provided, however, that no person shall be compelled to answer any interrogation regarding matters wherein he may have an immediate personal interest in concealing the truth, or in uttering what is false, not being an interest arising out of fear, favour, or reward, or any corrupt bargain or agreement with another party. These provisions are still in force, and are saved by section 2, *ante*. As to *criminating documents*, see section 130, *ante*.

Accomplice.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

State of English law as to accomplices.

Mr. Taylor, speaking of *accomplices*, "who are usually interested and always infamous witnesses, and whose testimony is admitted from necessity,[2] it being often impossible, without having recourse to such

[2] It may, however, be observed that the objections which may be made against the reliability of the testimony of accomplices do not apply with similar force to all accomplices. Mr. Taylor, in a subsequent paragraph, says: "One class of persons, *apparently accomplices*, may here be named, to whom the rule requiring corroborative evidence does not apply, namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprize, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. *The early disclosure is considered as binding the party to his duty*; and, though a great degree of disfavour may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as that of an accomplice"—(§ 891; § 971, 8th edn.) See also *Queen* v. *Ramsada Chakravartti* (20 W. R. Cr. 19), where the witness had been already tried and convicted for the offence as to which she was called to give evidence.

evidence, to bring the principal offenders to justice," thus explains the law on this subject:—"The *degree* of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. *But no positive rule of law exists on the subject;* and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that Judges, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of the Judge. Considering, too, the respect which is always paid by the jury to such advice from the Bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the uncorroborated testimony of an accomplice. The Judges do not in such cases withdraw the case from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony." Mr. Roscoe says:[a] "The law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a Judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a Judge who did not so advise them was right."

Law in India.

The law on this point in India was fully discussed by the Calcutta High Court in the Full Bench case of *Queen* v. *Elahi Baksh* (B. L. R. Sup. Vol. F. B. 459; 5 W. R. Cr. 80). *Peacock, C. J.* (*Kemp* and *Phear, JJ.*, concurring) said:—"I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle. The point was decided in England as far back as the 10th December, 1662, after conference with all the Judges." After a review of the English cases, the learned Chief Justice proceeds:—"The law of England, therefore, upon this subject is beyond doubt. It was contended in the course of argument in the present case, that, in India, the rule of evidence in the Mufassil is different from the law of England, with respect to the legality of convicting upon the uncorroborated evidence of an accomplice. If there had been a long uniform course of decisions in the late Sadr Court, that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions and to act upon the rule '*Stare decisis*.'* One case only was cited in which a Judge of the Sadr Court stated that he did not think it legal to

[a] Digest of the Law of Evidence in Criminal Cases.
* "To abide by the decided cases."

convict upon such evidence (7 Nizámat Reports, p. 67). There may be other cases to the same effect. But there is no uniform current of decisions which would justify us in holding that the law in this respect in the Mufassil was different from the established law of England, and from that which was administered in the late Supreme Court and is now administered by this Court in the exercise of original criminal jurisdiction. It would require a uniform train of decisions to justify us in holding that the law of evidence to be administered by the Court upon such a point as this, is different in the exercise of the appellate criminal jurisdiction from that which is acted upon in the exercise of original jurisdiction."

The Chief Justice then proceeded to consider the question, whether the omission of the Judge to advise the jury as to the amount of credit which ought to be given to the testimony of an accomplice, was such an error in law as to furnish a valid ground of appeal. After a learned review of the authorities in English and Scotch law, he continued :—"It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. The question is, whether the omission of the presiding Judge on a trial in the Mufassil to make such observations is not such an error in his summing up as to justify the Court on appeal or revision in setting aside a verdict of guilty. . . . . By section 379[5] of the Code of Criminal Procedure it is enacted that, in a trial by jury, the Judge shall sum up the evidence on both sides, and the jury shall then deliver their finding upon the charge, and 'a statement of the Judge's direction to the jury shall form part of the record.' There can be no doubt that *that* section requires the Judge to sum up properly, and that there would be very great danger in holding that there is no remedy by appeal against a verdict of "guilty," if it appears clearly to the High Court *that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.* It appears to me that it amounts to an error of law in the summing up, which, on appeal, is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in sections 439 and 426,[5] *viz.*, that the Appellate Court is satisfied that the accused person has been *prejudiced* by the error or defect, and that a failure of justice has been occasioned thereby."

The whole of this judgment is well worthy of careful study. The state of the law as settled thereby is as follows :—A conviction upon the uncorroborated evidence of one accomplice or more than one is valid in law.[6]

[5] *i.e.* of the *old* Code, Act XXV of 1861. The provisions of the present Code of Criminal Procedure are similar.

[6] See also *Queen* v. *Godai Rant*, 5 W. R. Cr. 11 : *Queen* v. *Lachmi Pershad*, 19 W. R. Cr. 43 : *Queen* v. *Koa*, 19 W. R. Cr. 48 : *Reg.* v. *Ramasami Padayachi*, I. L. R. 1 Mad. 394 : *Queen-Empress* v. *Ram Saran*, I. L. R. 8 All. 306 : *Queen-Empress* v. *Gobardhan*, I. L. R. 9 All. 528.

but the Judge in summing up should advise the jury as to the danger of convicting a prisoner on such evidence merely. If he omit to do so, and if, moreover, the Appellate Court is satisfied that the prisoner was prejudiced by such omission, there will be error in law, on account of which the verdict will be set aside. It would appear that The Evidence Act has not altered the law as settled by the above case. Reading together section 114 and Illustration (*b*) thereto, the Court may consider, though it is not bound to consider, an accomplice unworthy of credit, unless he is corroborated in material particulars. But the presumption allowed by Illustration (*b*) of section 114 that an accomplice is unworthy of credit unless he is corroborated in material particulars, it has been said by the Bombay High Court, has become a rule of practice of almost universal application. Judges now in their charge usually tell a jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence. A Judge who combines the functions of Judge and jury is equally bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character. There may be, however, cases of an exceptional character in which the accomplice evidence alone convinces a Judge of the facts required to be proved, and section 133 would support him if he acted on that conviction without the corroboration usually insisted on: *Queen-Empress* v. *Maganlal and Motilal*, I. L. R. 14 Bom. 115. Again, in another case (*Queen-Empress* v. *Chagan Dayaram*, I. L. R. 14 Bom. 331), it has been said by the same High Court: "The rule in section 114 and that in section 133 are part of one subject; . . . and neither section is to be ignored in the exercise of judicial discretion. The Illustration (*b*) is, however, the rule, and when it is departed from, the Court should show, or it should appear, that the circumstances justify the exceptional treatment of the case." The result would, therefore, seem to be that it is discretionary with a Judge to presume or not to presume an uncorroborated accomplice unworthy of credit in any particular case. If he does not think proper to raise this presumption, and there are exceptional circumstances which show that he exercised a sound judicial discretion in not raising it, *the conviction is not illegal because it has proceeded upon the uncorroborated testimony of an accomplice.* But in almost all cases he ought, in the exercise of a sound judicial discretion, to raise the presumption and suggest it to the jury, and his omission to do so will be held to have prejudiced the accused—see *Queen* v. *Sadhu Mandal*, 21 W. R. Cr. 69. *Queen-Empress* v. *Arumuga*, I. L. R. 12 Mad. 196: and *Queen-Empress* v. *O'Hara*, I. L. R. 17 Calc. 642. In this last mentioned case, the Judge charged the jury that they were not to convict upon the evidence of a certain witness, if satisfied that he was an accomplice, and that his evidence was uncorroborated, but strongly expressed his own opinion that the witness was not an accomplice. It was held that this constituted a misdirection in fact though not in form.

Does The Indian Evidence Act alter the law?

The second portion of Illustration (*b*) to section 114 is in accordance with the language of *Peacock, C. J.*, in the case of *Queen* v. *Elahi Baksh* :—"If two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion might be proved in corroboration of his evidence under Act II of 1855, section 31.[1] The evidence of the several accomplices so corroborated might be sufficient to satisfy a jury, although the evidence of any one of them alone could not have been safely acted upon." As to what constitutes corroboration, see also *Queen* v. *Dwarka*, 5 W. R. Cr. 18 (The corroboration must be on matters directly connecting the prisoner with the offence, and the evidence of two or more accomplices requires confirmation equally with the testimony of one) :— *Queen* v. *Chatterdhari Singh*, *ib.* 59 ("Very unsafe to convict without some corroborative evidence connecting the particular person accused with the transaction") :—*Queen* v. *Nawab Jan*, 8 W. R. Cr. 19 : *Queen* v. *Baikantho Nath Banarji*, 3 B. L. R. F. B. 2. *Queen* v. *Khotab Sheikh*, 6 W. R. Cr. 17 : *Queen* v. *Shamsher Beg*, 9 W. R. Cr. R. 51 *Queen* v. *Mahima Chandra Das*, 6 B. L. R. App. 108 : *Queen* v. *Mohesh Biswas*, 10 B. L. R. 455 *note*. 19 W. R. Cr. 16 ("Evidence from sources independent of the approver should be forthcoming relative to facts which implicate the prisoner in the same way as the story of the approver does") : *Queen* v. *Chando Chandalini*, 24 W. R. 55 ("Where a witness admits that he was cognizant of the crime as to which he testified, and took no pains to prevent it or disclose it, his evidence must be considered as no better than that of an accomplice") : *Queen* v. *Sristidhar Saha*, 25 W. R. 42 : *Queen* v. *Baiju Chaudhri*, 25 W. R. Cr. 43 . *Queen-Empress* v. *Krishnabhat*, I. L. R. 10 Bom. 319 · *Queen-Empress* v. *Imdad Khan*, I. L. R. 8 All. 137 : *Reg.* v. *Malapa bin Kapana*, 11 Bom. H. C. Rep. 196 (Neither previous statements of the same accomplice, nor the confession of a co-prisoner, is sufficient corroboration) *Queen* v. *Jaffir Ali*, 19 W. R. Cr. 57 . *Queen* v. *Naga*, 22 W. R. 24 . *Reg.* v. *Buanu Nanku*, I. L. R. 1 Bom. 475 : *Queen* v. *Udhan Bind*, 19 W. R. Cr. 68 . *Empress* v. *Mohan Lal*, I. L. R. 4 All. 46 · *Queen-Empress* v. *Bipin Biswas*, I. L. R. 10 Calc. 970 (Confessions of co-prisoners insufficient). In *R.* v. *Wilks* (7 C. & P. 272) *Alderson, B.*, said :—"There is a great difference between confirmations of an accomplice as to the *circumstances* of the felony and those which apply to the individuals charged. The former only show that *the accomplice was present at the commission of the offence*, but the others show that *the prisoner was connected with it*." Where, on a charge of sheep-stealing, evidence was given to show that a quantity of mutton, corresponding with the parts of the stolen sheep, was found in the prisoner's house, this was held sufficient corroboration to be left to the jury (*Reg.* v. *Birkett*, 8 C. & P. 732). In *Reg.* v. *Farlar* (8 C. & P. 106) Lord Abinger said that, in his opinion, the corroboration ought to consist in some circumstance that *affects the identity of the accused person*

[1] See now section 157, *post*.

The amount of corroboration required to the evidence of an accomplice must depend on circumstances: *Queen* v. *Kala Chand Das*, 11 W. R. Cr. 21. It is not necessary that an informer should be corroborated in every particular because if such evidence could be found, it would be unnecessary to call the approvers: *Reg.* v. *Gallagher*, 15 Cox. C. C. 282 (318). The evidence of a person who bribes is admissible against the person bribed: *Queen* v. *Abhai Charan Chakravartti*, 3 W. R. Cr. 19: *Queen-Empress* v. *Samiappa*, I. L. R. 15 Mad. 63.

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

The effect of this section is that the evidence of a single witness is sufficient proof of any fact,[a] if the Court or the jury believe him. It may be well to mention the cases in which, under the old rule, something more was required than the uncorroborated evidence of a single witness. The change in the law made by the above section will thus be more clearly understood. Moreover, these cases must still be useful in assisting the judgment to decide upon the weight to be allowed to evidence under peculiar circumstances. And first as to *Treason*—The rule of English Statute Law in regard to treason[b] and misprision of treason is, that no persons shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of two lawful witnesses, either both to the same overt act, or one to one, and the other to another, overt act of the same treason, unless the accused shall openly without violence confess the same: and further that, if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another, another, shall not be deemed to be two witnesses to the same treason. Any *collateral* matter not conducing to the proof of the overt acts of treason, may be proved by a single witness, or by any other evidence admissible at Common Law, *e.g.*, that the prisoner is a subject of the British Crown. The rule of the Statute Law, which requires two witnesses in a case of treason, does not in England apply to those treasons which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty, or any attempt to injure in any manner whatsoever her royal person; or to the misprisions of any such treason; but in all these cases

Cases in which English law requires more than the evidence of a single witness—Treason.

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[a] A conviction upon the statement of a complainant alone is lawful (*Kalam Mandal* v. *Bhawani Prasad*, 22 W. R. Cr. 32).

[b] Section 28 of the repealed , II of 1855, recognized the English law on the above subject. It was as follows:—"Except in cases of treason, the *direct* evidence of one witness, *who is entitled to full credit*, shall be sufficient for proof of any fact in any such Court or before any such person: But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury."

the accused shall be indicted, arraigned, tried and attainted, in the same manner and according to the same course and order of trial, and upon the like evidence as if he stood charged with murder (see 39 & 40 Geo. III. cap. 93 : 1 & 2 Geo. IV. cap. 24 : 5 & 6 Vict. cap. 51). The offence of '*Treason*' is unknown in the phraseology of Indian law. Offences somewhat analogous are provided for by Chapter VI of the Indian Penal Code, as amended by Act XXVII of 1870.

Perjury.

In cases of *perjury*, two witnesses were formerly held necessary in England. But this rule is not now law, though something more than the evidence of a single opposing witness is required; for otherwise there would be only oath against oath, and nothing to turn the scale. The single witness must be corroborated by material and independent circumstances. "But," says Mr. Taylor, "it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. Thus, a letter written by a defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still evidence confirmatory of the single accusing witness in some slight particulars only will not be sufficient to warrant a conviction; but it must at least be strongly corroborative of his testimony: or to use the quaint but energetic language of Chief Justice Parker, 'a strong and clear evidence and more numerous than the evidence given for the defendant.'" (§ 876; § 889, 8th edn.) Without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may be sufficient for conviction without further proof. This rule of English law has been followed in India. The most important decision on the subject is that of a Full Bench of the Calcutta High Court in the case of *Queen* v. *Lal Chand Kaurar* (B. L. R. Sup. Vol. F. B. 417 : 5 W. R. Cr. 23). *Peacock, C. J.*, said:—"According to the law as administered in the exercise of original criminal jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict for perjury, because it is governed by the rules of the law of England. I do not mean to say that every rule of the law of evidence as administered in England applies to the Mufassil. But I cannot think that we ought to put such a construction upon section 28, Act II of 1855,[1] as would allow a person to be convicted of perjury at Alipore,[2] or in other parts of the Mufassil, upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its original criminal jurisdiction. Such a construction would not be very consistent. But if the law is so, we are bound by it. If there was any rule or practice in the Sadr Court or in the Courts in

[1] See *ante*, page 612 note.

[2] A suburb of Calcutta, just outside the local limits of the Original Jurisdiction of the High Court, and the head-quarters of the district of the *Twenty-four Parganas*.

the Mufassil which, before Act II of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in section 28. Now, there is a case which was decided by Mr. Samuells in the Sadr Court (see Nizamat Reports, Vol. XI, p. 212, *Government* v. *Gharib Peada*), in which the rule was laid down as follows:—'Perjury is not to be assumed because the story of one man appears more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false.' That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary; that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. The rule, which was laid down by the Sadr Court in this case, is supported by other cases and is in accordance with the principle of the English law. Indeed, I think, I may safely say that it was the practice of the Sadr Nizámat and of the Mufassil Courts not to allow a conviction for perjury upon the uncorroborated evidence of a single witness: consequently, the case does not fall within the general rule of section 28, inasmuch as it is taken out of that rule by the provision, which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in case of perjury." In the case of *Queen* v. *Bakshi Chaubi* (5 W. R. Cr. 98), the accused was charged with giving false evidence by denying that he had verified or presented a certain written statement and it was held that the corroboration, derived from a comparison of signatures, was sufficient to sustain a conviction.

"If the evidence adduced in proof of the crime of perjury consists," says Mr. Taylor, "of *two opposing statements by the prisoner* and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed from the solemnity of the sanction that the declaration was the truth, and the other an error or falsehood; though the latter being inconsistent with what he has sworn, may form important evidence *with other circumstances* against him; and *if both the contradictory statements were delivered under oath*, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If indeed it can be shown that, before making the statement upon which perjury is assigned, the accused had been *tampered* with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained; and, provided the nature of the statements was such that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that, because a man has given contradictory accounts of a transaction on two occasions, he has thereby committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact from the best of his

Case of two contradictory statements.

recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time." The latter portion of the above quotation consists of the remarks of *Holroyd, J.*, in *R.* v. *Jackson* (1 Lew. C. C. 270), and may well be borne in mind in India where the law on the subject of contradictory statements is not the same as in England. Two Full Benches of the Calcutta High Court have at different times decided that, where no evidence for the prosecution is offered corroborative of either statement, and the giving intentionally of false evidence is charged on two contradictory depositions made, the one before the committing Magistrate, and the other before the Sessions Judge, a finding in the alternative is sufficient to maintain a conviction (*Queen* v. *Zumiron*, 6 W. R. Cr. 65: B. L. R. F. B. 521: *Queen* v. *Muhamed Humayun Shah*, 21 W. R. Cr. 72: 13 B. L. R. F. B. 324). In the former case the learned Chief Justice (*Peacock*) thus delivered the opinion of the majority of the Court:—"I have no doubt that there may be an alternative finding, as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable. This appears to me to be quite clear when section 381[3] of the Code of Criminal Procedure is read together with section 242,[4] and clause 5, section 383, of that Code. A swears before the Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A on the trial swears that he did *not* see the prisoner kill B, and the prisoner is acquitted. A is in consequence committed for trial for giving false evidence, and two charges are framed against him under section 24, Code of Criminal Procedure:—1*st*, That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill B: 2*nd*, That he intentionally gave false evidence before the Sessions Judge by swearing that he did *not* see the prisoner kill B. The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate or that made before the Sessions Judge was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness in consequence of bribery or other cause has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, A ought

[3] See the corresponding section (367) of the *present Code*, Act X of 1882.
[4] See section 236 and the specimen charge of an offence under section 192 of the Penal Code in Part XXVIII (II) of Schedule V of Act X of 1882.

to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit. In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads under section 242. The Sessions Judge would also be strictly within the letter, as well as the spirit, of sections 381 and 382 (clause 5), in finding that A is guilty of the offence of intentionally giving false evidence, and that he is guilty *either* of the offence specified in the first head, *or* of the offence specified in the second head of the charge." The second Full Bench case was decided after the Code of 1872 came into operation. See, to the same effect, *Queen* v. *Palany Chetty*, 4 Mad. H. C. R. 51; and *Queen* v. *Ross*, 6 Mad. H. C. Rep. 342. The same rule has been laid down by the Allahabad High Court in *Queen-Empress* v. *Chulet*, I. L. R. 7 All. 44, in which a previous decision of the same Court to the contrary effect (*Queen* v. *Niaz Ali*, I. L. R. 5 All. 17) was expressly overruled. The Calcutta High Court in a recent case (*Habibullah* v. *Queen-Empress*, I. L. R. 10 Calc. 937) has adhered to rule laid down in *Queen* v. *Zamiran* and *Queen* v. *Mahomed Hamayun Shah*. It may again be remarked here that the study of the Law of Evidence is greatly assisted by a knowledge of the principles of logic. If the "*opposition*" between the two statements or propositions, upon which perjury is assigned, is that known by logicians as *contradiction*, one of them *must* be false; if they were *contraries*, both *might* be false, but both could not be true; if they were *sub-contraries*, both statements *might* be true, and a conviction in the alternative *could*, therefore, be wrong. The following cases will supply instances of convictions on alternative charges, some of which have been upheld, and others of which have been reversed: *Empress* v. *Nathu Sheikh*, I. L. R. 10 Calc. 405; *Queen* v. *Utar Narain Singh*, 8 W. R. Cr. 79; *Queen* v. *Dinonath Bajar*, 9 W. R. Cr. 52; *Queen* v. *Sundar Mohari*, 9 W. R. Cr. 25; *Queen* v. *Bedu Noshya*, 12 W. R. Cr. 11; *Queen* v. *Kola*, 12 W. R. Cr. 66; 4 B. L. R. A. Cr. 4; *Queen* v. *Mati Khowa*, 3 B. L. R. A. Cr. 36; 12 W. R. Cr. 31; *Queen* v. *Ganauri*, 22 W. R. Cr. 2; *Queen* v. *Nomal*, 4 B. L. R. A. Cr. 9; *Queen-Empress* v. *Ramji Sajabarao*, I. L. R. 10 Bom. 124; and *Queen-Empress* v. *Bharma*, I. L. R. 11 Bom. 702. In *Queen* v. *Nomal*, *Norman, J.*, said:—"To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the infirmities of human memory, to fail to understand how slow are the intellects, and how imperfect the powers of expression of uneducated peasants; how readily the fears of such people are excited in Courts of Justice; how completely they lose nerve and presence of mind, when frightened. I firmly believe that if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes, subjected to cross-examination by an adroit and perhaps not over-scrupulous advocate, would be safe."

Other Cases.

In *bastardy* cases, it is the rule of English law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material particular by other testimony. "This rule has been wisely established," says Mr. Taylor, "in order to protect men from accusations which profligate, designing and interested women might easily make, and which, however false, it might be extremely difficult to disprove." These remarks may occasionally be well borne in mind by Magistrates disposing of cases under Chapter XXXVI of the Code of Criminal Procedure. Finally, section 2 of "The Evidence Further Amendment Act, 1869," 32 & 33 Vict. cap. 68, enacts that "the parties to an *action for breach of promise of marriage* shall be competent to give evidence in such action; provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Although corroboration is not required in India in any of the above cases, it may be well, when estimating the value of testimony in particular instances, to bear in mind that the Legislature in England has not thought it safe in such cases to accept the testimony of a single witness without some corroboration.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Civil Procedure.

According to the provisions of the Code of Civil Procedure the evidence of the witnesses upon the trial of a civil case is to be taken orally in open Court[5] in the presence and under the personal direction and superintendence of the Judge (section 181). The order in which the witnesses are to be produced and examined at the trial of an original case is regulated by sections 179 and 180 of the Code. The right to begin and the right to reply upon the hearing of a civil appeal are regulated by section 555, which enacts that,

[5] There are three exceptions to this general rule:—(1) when evidence is taken by commission (see *ante*, p. 205 *et seq*): (2) when the Court *for sufficient reason* orders any fact or facts to be proved by affidavit, in which case the witness may be directed to be produced for cross-examination (see sections 194—197 of the Code of Civil Procedure): (3) when a witness about to leave the jurisdiction of the Court is examined before the trial. (See section 192 of the Code). It has been held that evidence under this section must be taken by the Court and cannot be taken by commission, unless the parties consent (*Edwards* v. *Muller*, 5 B. L. R. 252).

"on the day fixed" for hearing the appeal, "or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply." When the respondent objects that no appeal lies, upon this preliminary point the appellant has the right to begin (*Rustomji Burjorji* v. *Kessowji Naik*, I. L. R. 8 Bom. 287).

Criminal Procedure.

According to the provisions of the Code of Criminal Procedure the witnesses upon a criminal trial must be examined in the presence of the accused person, or when his personal attendance is dispensed with, in presence of his pleader,—a permission which may be granted in cases before Magistrates, but not in cases before the Court of Session.[6] It will not be a sufficient compliance with this requirement of the law to read over to the witnesses, in the presence of the accused, depositions given by them on a former trial or in a previous stage of the same trial when the accused was not present, and inquire if these depositions are correct, requiring the witnesses at the same time to identify the prisoner. No matter how often the same case comes before the Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo* (*Queen* v. *Kanai*, W. R. 1864, Cr. 38: *Queen* v. *Kiyamat*, *id.* p. 1: *Queen* v. *Afazudin*, *id.* 13: *Queen* v. *Mutti Nushya*, *id.* 18: *Queen* v. *Mohan Banfor*, 22 W. R. Cr. 38: *Queen* v. *Raj Krishna Mitra*, 1 B. L. R. O. Cr. 37).[7] In a trial before the Court of Session, after the accused has pleaded to the charge, and the jurors or assessors have been chosen, the prosecutor opens his case and examines his witnesses (section 286 of the Code of Criminal Procedure).[8] After this the examination of the accused person duly recorded by or before the committing Magistrate is to be tendered by the prosecutor and read as evidence (section 287); and the accused may be examined (section 342). He is then asked if he means to adduce evidence. If he says that he does not, the prosecutor may sum up his case; and if the *Court considers that*

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[6] See sections 116, 205 and 353 of the Code of Criminal Procedure. As to a *pardahnashin* woman appearing by pleader, see the case of *Rahim Bibi*, I. L. R. 6 All. 59.

To the rule which requires the witnesses in criminal cases to be examined in the presence of the accused person there are *three* exceptions:—(1) when witnesses are examined by commission (*ante*, p. 206): (2) when the accused has absconded and evidence is taken in his absence (*ante*, p. 204): (3) when an Appellate Court directs that additional evidence be taken by the lower Court, and directs that such additional evidence may be taken without the accused person or his pleader being present (see section 428 of the Code of Criminal Procedure).

[7] It has been held that though to omit to do this is illegal, yet if it has not occasioned a failure of justice a new trial need not be ordered: *Subba* v. *Queen-Empress*, I. L. R. 9 Mad. 83.

[8] As to the duty of the prosecution in this respect, see *Empress* v. *Grish Chandra Talukdar*, I. L. R. 5 Calc. 614: *Empress* v. *Dhandu Kazi*, I. L. R. 8 Calc. 121: 10 C. L. R. 151: *Queen-Empress* v. *Tulla*, I. L. R. 7 All. 904: *Queen-Empress* v. *Ram Sahai Lal*, I. L. R. 10 Calc. 1070: *Empress* v. *Kali Prasanno Das*, I. L. R. 14 Calc. 245: *Queen-Empress* v. *Stanton and Flynn*, I. L. R. 14 All. 521.

there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty. The Court may take the same course, if the accused or any one of several accused says that he means to adduce evidence, and the *Court considers that there is no evidence that the accused committed the offence*. If the accused or any one of several accused says that he means to adduce evidence, and the *Court considers that there is evidence that he committed the offence*, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case, and the *Court considers that there is evidence that the accused committed the offence*, the Court shall call on the accused to enter on his defence (section 289). The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any), and after their cross-examination and re-examination (if any), may sum up his case (section 290). If the accused or any of the accused has stated, when asked under section 289, that he means to adduce evidence, the prosecutor is entitled to reply (section 292). When the attorney for the defence first said that he meant to call witnesses, but afterwards on reconsideration said that he would not, and the Judge allowed the prosecutor to to reply, it was held that he ought not to have done so (*Empress* v. *Hari Charan Chakravarti*, I. L. R. 10 Calc. 140). The giving of documentary evidence by an accused person during the cross-examination of the witnesses for the prosecution and before he is asked under section 289 if he means to adduce evidence, does not give a right of reply to the prosecution: *Queen-Empress* v. *Grish Chandra Banarji*, I. L. R. 10 Calc. 1024: *Empress* v. *Kali Prasanno Das*, I. L. R. 14 Calc. 245: *Queen-Empress* v. *Solomon*, I. L. R. 17 Calc. 930: and *Queen-Empress* v. *Krishnaji Babuvao Butell*, I. L. R. 14 Bom. 436: but see *contra*, *Queen-Empress* v. *Hayfield*, I. L. R. 14 All. 212: *Queen-Empress* v. *Venkatipalhi*, I. L. R. 11 Mad. 339). The Code of Criminal Procedure makes no express provision for counsel, pleaders or other persons addressing the Court in Magistrates' cases or in the course of proceedings preliminary to commitment: but section 340 provides generally that any person accused before any Criminal Court may of right be defended by a pleader. No party has any right to be heard either personally or by pleader before any Court exercising its powers of revision, but the Court may, if it thinks fit, hear any party either personally or by pleader (section 440): but no order can be made to the prejudice of an accused person, unless he has had an opportunity of being heard either personally or by pleader (section 439). When a question of law has been reserved by a Judge of a High Court, exercising original criminal jurisdiction, and it comes on to be argued before a Court consisting of two or more Judges (section 434), the prisoner's counsel has the right to begin (*Empress* v. *Appa Subhana Mendro*, I. L. R. 8 Bom. 200).

It frequently happens in India that a Judge or Magistrate, who has partly heard a case, is unable to decide it in consequence of being transferred.

to another district or from some other cause. The Legislature has thought proper to provide for this contingency. Section 191 of the Code of Civil Procedure enacts that where the Judge, taking down any evidence or causing any memorandum to be made under that Chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum as if he himself had taken it down or caused it to be made. Similar provisions are found in the Code of Criminal Procedure in respect of Magistrates' cases. Section 370 enacts that, "whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial[9]: Provided as follows:—(a) In any trial, the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard: (b) The High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate, may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby; and may order a new inquiry or trial. Nothing in this section applies to cases in which proceedings have been stayed under section 346.[1] There is no similar provision as to cases tried by the Court of Session, and the sections of the Code applicable to Sessions trials clearly contemplate the whole trial taking place before the same Judge. Under the Code of 1861, it was decided that if the Judge who recorded some of the depositions of the witnesses were obliged to leave the district before he could conclude the trial, his successor must re-commence *de novo* (*Queen* v. *Charru*, W. R. 1864, Cr. 32): and under the Code of 1872 it was held that a Sessions Judge could not convict an

Evidence taken by Judge or Magistrate, who is prevented from deciding the case.

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

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[9] There is one other case in which a Magistrate may deal with a case upon evidence not recorded by himself, *viz.*, when a Subordinate Magistrate, having jurisdiction, is of opinion that an accused person is guilty, and considering that a more severe punishment should be inflicted than he is competent to adjudge, submits his proceedings to the District Magistrate, or Subdivisional Magistrate, to whom he is subordinate, and such latter Magistrate proceeds to pass judgment and sentence (see section 319 of the Code of Criminal Procedure). In this case, however, the District or Subdivisional Magistrate may, if he thinks fit, examine the parties, and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence.

[1] That is when, in the course of an inquiry or trial, a provincial Magistrate finds that a case should be tried or committed for trial by some other Magistrate and, staying proceedings, submits the case to a Magistrate to whom he is subordinate.

accused person upon evidence recorded by his predecessor (*Queen* v. *Gopi Noshyo*, 21 W. R. Cr. 47: *Queen* v. *Raghunath Das*, 23 W. R. Cr. 59).

Section 423, Code of Criminal Procedure, prescribes the procedure for hearing a criminal appeal. It provides that the appellate Court shall hear the appellant or his pleader and the Public Prosecutor, and shall then proceed to dispose of the case. The appellant has therefore apparently no right of reply as in a civil appeal.[2]

Witnesses are examined upon oath or affirmation according to the provisions of "The Indian Oaths Act," X of 1873, which here follows :—

The Indian Oaths Act.

An Act to consolidate the Law relating to Judicial Oaths, and for other purposes.[3]

Preamble.

WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations, and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows :—

I.—*Preliminary.*

Short title.

1. This Act may be called "The Indian Oaths Act, 1873."

Local extent.

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty.

Commencement.

(*Repealed.*)

2. (*Repealed*).

Saving of certain oaths and affirmations.

3. Nothing herein contained applies to proceedings before Courts-Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of The Indian Councils' Act, 1861, the Governor-General in Council has not power to repeal.

II.—*Authority to administer Oaths and Affirmations.*

Authority to administer oaths and affirmations.

4. The following Courts and persons are authorized to administer by themselves, or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law :—

(*a*) all Courts and persons having by law or consent of parties authority to receive evidence ;

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[2] But in the High Court the appellant is allowed a reply.

[3] This Act has been declared in force in Upper Burmah generally—see Part I, Schedule 2, Act XX of 1866. It is included in the Schedule to the Santal Parganas Laws Regulation, III of 1866. It has been declared under The Scheduled Districts Act, 1874, to be in force in the following districts, *viz.*, Hazaribagh, Lohardaga and Manbhum, the Pargana Dhalbhum, and the Kolhan in the district of Singhbhum (see *Gazette of India*, 22nd October, 1881, Part I, p. 504), the N.-W.-P. Tarai (see *Gazette of India*, 23rd September, 1876, Part I, p. 505) and under the same Act it has been extended to the Scheduled District of Coorg (see *Gazette of India*, 5th August, 1876, Part I, p. 417).

(*c*) the Commanding Officer of any military station, occupied by troops in the service of Her Majesty: provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:

witnesses;

(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

interpreters;

(*b*) interpreters of questions put to, and evidence given by, witnesses; and

jurors.

(*c*) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by Natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

Forms of oaths and affirmations.

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And, until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

Power of Court to tender certain oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs and not repugnant to justice or decency, and not purporting to affect any third person, the Court[4] may, if it thinks fit, notwithstanding anything thereinbefore contained, tender such oath or affirmation to him.

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[4] As to whether, when a case has been referred to arbitration under the provisions of the Code of Civil Procedure, the arbitrators have power to proceed under this section, see *Wali-ul-la* v. *Ghulam Ali*, I. L. R. 1 All. 535

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Court may ask party or witness whether he will make oath proposed by opposite party.

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Administration of oath, if accepted.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.[5]

Evidence conclusive as against person offering to be bound.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the fact that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.[6]

Procedure in case of refusal to make oath.

V.—Miscellaneous.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission,[7] substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Proceedings and evidence not invalidated by omission of oath or irregularity.

As to the applicability of these provisions to a case in which the parties agreed that the matters in difference between them should be decided according to the oath of a third person, see *Lekhraj Singh* v. *Dulhma Kuar*, I. L. R. 4 All. 302.—See *ante*, page 130.

Sections 8–11 do not apply to the complainant and accused in criminal proceedings: *Queen-Empress* v. *Murarji Gokuldas*, I. L. R. 13 Bom. 389. The consent of a guardian to an agreement under this section will bind a minor, even though not sanctioned by the Court under section 462, C. P. C.: *Chengalreddi* v. *Venkatareddi*, I. L. R. 12 Mad. 483.

[5] See the object and effect of this section discussed in *Vasudeva Shanbog* v. *Naraina Pai*, I. L. R. 2 Mad. 356.

[6] A presumption adverse to the party refusing to take the oath may be raised: *Ishan Miah* v. *Kaluram Chandra Naha*, 2 C. L. R. 476.

[7] It has been held that the word "omission" in this section includes any omission, and is not limited to accidental or negligent omissions (*Queen* v. *Sewa Bhogta*, 14 B. L. R. F. B. 294: 23 W. R. Cr. 12). See also *Queen* v. *Itwarya*, 14 B. L. R. 54: 22 W. R. 14. This was dissented from in *Queen-Empress* v. *Maru*, I. L. R. 10 All. 207, but affirmed in *Queen-Empress* v.

Persons giving evidence bound to state the truth.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Amendment of Penal Code sections 178 and 181.

15. The Indian Penal Code, sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Official oaths abolished.

16. Subject to the provisions of sections 3 and 5 no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

The Codes of Civil and Criminal Procedure provide for procuring the attendance of witnesses before the Civil and Criminal Courts respectively. The attendance of witnesses before Coroners is provided for by "The Coroner's Act," IV of 1871. Act III (B. C.) of 1866 provides for the attendance and examination of witnesses before the Council of the Lieutenant-Governor of Bengal for making Laws and Regulations; and Act XIII (Bom. C.) of 1866 makes similar provisions for the Bombay Council. If a person, upon whom a summons to give evidence or produce a document before a Civil Court has been served, without lawful excuse fails to comply with such summons, the Court may sentence him to pay a fine not exceeding five hundred rupees (section 174 of the Code of Civil Procedure). He is further liable to a civil action for damages under the provisions of section 26 of Act XIX of 1853, which is in force in the Bengal Presidency, or of section 10 of Act X of 1855, which is in force in the Madras and Bombay Presidencies. The provisions of these sections, which are unrepealed and are almost identical, are as follows:—"Any person, *whether a party to the suit or not*, to whom a summons to attend and give evidence or produce a document shall be *personally* delivered,[8] and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded or kept out of the way to avoid being served with such summons, and any person who being in Court and upon being required by the Court to give evidence, or to produce a document in his possession, shall, without lawful excuse, refuse to give evidence or sign his deposition, or to produce a document in his possession, shall, in addition to any proceedings under this Act" (in section 10, Act X of 1855, "proceedings to which he would otherwise be subject"), "be *liable* to the party at whose request the summons shall have been issued, or at whose instance he shall be required to

Consequences of non-attendance of persons as witnesses.

Shaya, I. L. R. 16 Bom. 359. In *Queen-Empress* v. *Lal Sahai*, I. L. R. 11 All. 183, it was pointed out that if a witness, however young or old, is able to give a rational account of what he has seen or heard or done on a particular occasion, he must be examined either on oath or affirmation. See also *Queen-Empress* v. *Viraperumal*, I. L. R. 16 Mad. 105. See this section applied where the Jury were not sworn in *Queen* v. *Ramsadai Chakravartti*, 20 W. R. Cr. 19. See 6 and 7 Vict. cap 22.

[8] The action will not lie unless personal service has been effected (*Dhanpat Singh* v. *Prem Bibi*, 24 W. R. 72).

give evidence or produce the document, *for all damages which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil suit.*"[9] The measure of the damages in such a case is, under English law, the cost of withdrawing the record from trial or of obtaining a postponement; but in India it must be borne in mind that, under the Civil Procedure Code, a plaintiff cannot withdraw from his suit with liberty to sue again without the permission of the Court (section 373, and see *ante*, pages 293-294); and where he could not obtain this permission, and being forced to go to trial lost his cause owing to the default of a material witness, the question of damages might be a much more serious matter. Under English procedure a plaintiff may withdraw without going to trial at his own option, being liable only for defendant's costs. Persons failing to attend to give evidence or produce documents before the Courts of Justice, civil or criminal, may also be punished criminally with fine or imprisonment, or with both, under the provisions of sections 174 and 175 of the Indian Penal Code.

Persons exempted from personal attendance in Court.

The Code of Civil Procedure exempts from personal attendence in Court women, who, according to the customs and manners of the country, ought not to be compelled to appear in public (section 640). The Local Government may also, at its discretion, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption, and may, at its discretion, withdraw such privilege. Persons exempted from personal attendance under the above provisions can be examined by commission, but they must pay the costs of such commission, unless the party requiring the evidence pay such costs (section 641). There is no similar exemption from attendance before the Criminal Courts; but it has been held that a female not accustomed to appear in public may claim to give evidence sitting in a palanquin, having been previously identified to the satisfaction of the Court (*Queen on the prosecution of Rukia Banu* v. *Roberts*, 1 B. L. R. S. N. v: and see *ante*, page 207, *note*); or on commission: *In re Haro Sundari Chaudharani*, I. L. R. 4 Calc. 20: *In re Din Tarini Debi*, I. L. R. 15 Calc. 775—or special arrangements should be made for her examination in private: *In the matter of the petition of Basant Bibi*, I. L. R. 12 All. 69. All this, however, does not apply to a *pardanashin* lady who is a complainant: *In re Faridunnissa*, I. L. R. 5 All. 92.—See *ante*, *note*, p. 206.

Protection of witnesses from arrest.

According to English law, witnesses are protected from arrest upon any *civil* process while going to Court to give evidence, while attending there for the purposes of

[9] Witnesses, who have given evidence, cannot be sued for damages in respect of such evidence. The only penalty they can incur, if they give false evidence, is a prosecution for perjury (*Bishonath Rakhit* v. *Ramdhan Sirkar*, 11 W. R. 42: *Ganesh Dutt Singh* v. *Magniram Chaudhri*, 11 B. L. R. 328: *Bhikambar Singh* v. *Becharam Sirkar*, I. L. R. 15 Calc. 264: *Dawan Singh* v. *Mahip Singh*, I. L. R. 10 All. 425: *Chidambara* v. *Thirumani*, I. L. R. 10 Mad. 87: *Manjaya* v. *Sesha Shetti*, I. L. R. 11 Mad. 477).

the case, and while returning home. Section 642 of the Code of Civil Procedure enacts as follows:—"No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process, while going to, presiding in or returning from his Court." And, except as provided in section 337A, sub-section (5)[1] and sections 256[2] and 643,[3] where any matter is pending before a tribunal having jurisdiction therein or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal. It has been held in England that this privilege is that of the Court and not of the person arrested, and that an application for discharge may be made either to the Court before which the witness had to appear or to the Court under the process of which the arrest was made. The making of an arrest in violation of the privilege affords no ground for an action for damages. (Taylor, § 1340, p. 1135, 8th edn.) There is no similar protection against *criminal* process.

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

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[1] Relating to arrest in execution of a decree for money.

[2] Relating to arrest in the immediate execution of a decree for money not exceeding Rs. 1,000.

[3] Procedure in case of certain offences committed before the Civil Courts.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

See sections 10 and 104, *ante*.

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Order of examinations. Direction of re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him* so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined

* *Sic* in Government edition of the Act.

to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Unless evidence of reputation be admissible, witnesses must in general merely speak to facts within their own knowledge, and they will not be permitted, excepting under the circumstances that will presently be mentioned, to express their own belief or opinion: (Taylor, § 1271; § 1414, 8th edn.) On some particular subjects positive and direct testimony may often be unattainable, and in such cases a witness is allowed to testify as to his own belief or opinion or even to draw inferences respecting the fact in question, provided these facts be within his personal knowledge: (Taylor, § 1273; § 1416, 8th edn.) Witnesses are not permitted to state their views on matters of moral or legal obligation or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another: (Taylor, § 1276; § 1419, 8th edn.) Witnesses ought not to be allowed to make hearsay statements, as it is impossible to remove their effect from the mind of the Jury (*Queen* v. *Kali Charan Ganguli*, 7 W. R. Cr. 2). The moment a witness begins to give evidence which is inadmissible he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the Jury to reject the hearsay evidence and to decide on the legal evidence alone (*Queen* v. *Pitambar Sirdar*, 7 W. R. Cr. 25).

Hearsay evidence is not admissible in cross-examination, unless it be admissible under the provisions of section 146, *post*. (See *Ganauri Lal Das* v. *Queen-Empress*, I. L. R. 16 Calc. 211.)

As to the cross-examination of witnesses in criminal cases, see also section 256 of the Code of Criminal Procedure, which in warrant-cases tried by Magistrates entitles the accused person, after the charge has been read and he has pleaded thereto, to re-call and cross-examine[a] any witness for the prosecution present in the Court or its precincts.

Provisions of the Code of Criminal Procedure.

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[a] In *Kharakdhari Singh* v. *Persadi Mandal* (22 W. R. Cr. 44), it was held that it is in the discretion of the Court to allow the witnesses for the prosecution to be cross-examined at any period of the defence, and that they must not necessarily be cross-examined before the witnesses for the defence are examined. See also *In re Thakur Dyal Sen*, 17 W. R. Cr. 51; *Queen* v. *Ram Kishan Halwai*, 25 W. R. Cr. 48; *Talluri Venkayya* v. *Queen*, I. L. R. 4 Mad. 130; *Empress* v. *Baldeo Sahai*, I. L. R. 2 All. 253; *Faiz Ali* v. *Koromdi*, I. L. R. 7 Calc. 28; 8 C. L. R. 325. In this last case it was ruled that if an accused person wishes to recall and cross-examine the witnesses for the prosecution, he must express such a desire when the charge is read over to him and he is called on for his defence.

Limits of cross-examination.

According to the practice followed in England and Ireland, the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole case; and, therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. In America a different rule prevails, it having been determined by the Supreme Court that a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination, and that, if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him as such in the subsequent progress of the cause. In the case of *Queen* v. *Ishan Datta* (6 B. L. R. App. 88) the Calcutta High Court followed the English rule, which has also been substantially adopted by The Indian Evidence Act, for by the above section the cross-examination, provided it relate to *relevant* facts, need not be confined to the facts to which the witness testified in his examination-in-chief. Besides questions relating to relevant facts a witness may further be asked the questions provided for by section 146, *post*, *i.e.*, questions intended to test his veracity, to discover who he is and to shake his credit.

As a general rule, evidence is not legally admissible against a party, who at the time that it was given had no opportunity of cross-examining the witnessses or of rebutting their testimony by other evidence (see *antè*, section 33; *Gorachand Sirkar* v. *Ram Narain Chaudhri*, 9 W. R. 587; and *Radha Jiban Mustafi* v. *Taramani Dasi*, 12 Moo. I. A. 380). In this latter case the lower Courts had improperly admitted as evidence, in a suit for enhancement of rent, the depositions of witnesses taken in another and similar suit. When a case, decided *ex-parte* in the absence of the defendant, who had thus no opportunity of cross-examining the plaintiff's witnesses, was re-admitted to the file and to a hearing, it was held that the Court of first instance ought to have re-called the plaintiff's witnesses and allowed the defendant an opportunity of cross-examining them; and this not having been done, that their previous depositions could not be treated as evidence (*Ram Bakhsh Lal* v. *Kishori Mohan Saha*, 3 B. L. R. A. C. 273). "Whether," says Mr. Taylor, "when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that if he afterwards re-call the same witness to prove a part of his own case, he may interrogate him by leading questions and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle upon which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that in common fairness each party should alternately have the right of cross-examining such a witness as to his adversary's case,

while both should be precluded, in the course of the respective examinations-in chief, from putting leading questions with regard to their own."[6] This result will doubtless follow from the above provisions of The Indian Evidence Act, more especially from the definitions given in section 137. The party who *calls* a witness—apparently, at any stage of the case—examines him in chief. Such examination-in-chief would naturally be directed to the support of his own case, upon which the adverse party would then have the right to cross-examine. If the adverse party again *called* the same witness, he could clearly only examine him in chief. Where a witness called and examined by the plaintiff was not cross-examined on behalf of the defendants, the Court refused to allow him to be called afterwards for the defendants, as the leave of the Court had not been asked and obtained at the close of his first examination (*Mackintosh* v. *Nabin Mani Dasi*, 2 Jur. N. S. 161).

Use of cross-examination.

Cross-examination, properly conducted, is one of the most useful and efficacious means of discovering truth. "By means of it," says Mr. Taylor, "the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour and of determining the just value of his testimony. It is not easy for a witness subjected to this test to impose on a Court or Jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."[7] See also the observations of *Norman, J.*, on this subject in *Sujad Ali Khan* v. *Kashinath Das*, 6 W. R. 181. "Where a witness is evidently prevaricating or concealing the truth," says Mr. Alison, "it is seldom by intimidation or sternness of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The *most effectual method* is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination facts most material to the cause are elicited, which were either denied or but partially admitted before. In such cases there is no ground on which the facts thus reluctantly extorted, or which have escaped the wit-

[6] § 1291, § 1433, 8th edn. [7] § 1285, § 1428, 8th edn.

ness in an unguarded moment can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are educed; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal."[a] Bullying and browbeating a witness, misleading him, as for instance by putting questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact—questioning him in a manner which assumes that he has been lying throughout the whole or the greater part of his examination-in-chief—confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from him innumerable facts *insignificant* as they may appear to him at the moment, but which when put together and arranged create a whole, in which the most ignorant beholder instinctively recognizes—THE TRUTH.

If a competent witness be intentionally called and sworn, the opposite party is entitled to cross-examine him, although the party calling him has declined to ask him a single question. Where, however, a witness was sworn under a mistake, which was discovered before the examination-in-chief had begun, no cross-examination was allowed; and so, where the examination-in-chief of a witness was stopped by the Judge after he had answered merely an immaterial question. When several prisoners were tried on the same indictment and were separately defended, it was held that a witness called on behalf of one of them, and who gave evidence tending to criminate the others, might be cross-examined on behalf of those others. The Indian Evidence Act does not expressly provide for these cases.

Under section 165, *post*, a Judge can question a witness at any time about any fact relevant or irrelevant; but, as pointed out in *Nur Baksh Kazi* v. *Empress*, I. L. R 6 Calc. 279 : 7 C. L. R. 385, he should not ordinarily interpose after the examination-in-chief has been finished, and question the witnesses on the points to which the cross-examination will properly be directed, as to do so may render their subsequent cross-examination ineffective.

Object of re-examination.

The proper object of *re-examination* is to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination; and also of the motive or provocation which induced him to use them; to clear up evident misconceptions and errors committed by him while under examination; and to explain new facts which have come out on cross-examination. In England it is not permitted to go further and introduce matter new in itself. Thus,

[a] Alison's *Practice of the Criminal Law of Scotland*, 546, 547.

proof on cross-examination of a detached statement, made by or to a witness at a former time, does not authorize proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved. And where a witness had been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examination related, *although they were connected with the subject-matter of the suit.* Under the above section of The Indian Evidence Act new matter relevant to the suit may, *by permission* of the Court be introduced in re-examination; but if so introduced, the adverse party may further cross-examine upon such matter. Under the English rule it may be observed that any hardship is frequently obviated, when a question has been omitted in the examination-in-chief, and when, as not arising out of the cross-examination, it cannot be put in re-examination, by asking the Judge to put it—a request which is generally complied with.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Person summoned to produce document merely, need not attend personally.

With this section may be read section 164 of the Code of Civil Procedure which enacts that "any person may be summoned to produce a document, without being summoned to give evidence; and any person, summoned merely to produce a document, shall be deemed to have complied with the summons, *if he cause such document to be produced instead of attending personally to produce the same.*" It may be observed that section 26 of Act II of 1855, which was almost *verbatim* the same as the section just quoted, applied equally to civil and criminal proceedings. It was repealed by Act X of 1861, but only in so far as it was applicable to suits and proceedings under Act VIII of 1859; and it remained in force with respect to criminal proceedings until the whole Act was repealed by the second section of The Evidence Act, neither in which nor in the Code of Criminal Procedure of 1861 or 1872 was the provision reproduced for the Criminal Courts. Section 94 of the present Code has, however, supplied the omission and provided the same rule for criminal as for civil proceedings.

The rule contained in the above section is in accordance with the practice under English law. The witness who merely produces a document need not be sworn, and unless sworn he cannot be cross-examined.

In a case in which a witness had been summoned to produce a document, and in which he came to Court and stated on oath that he could not produce it, the Judge disbelieving him fined him Rs. 75 ostensibly under section 174, Penal Code. It was, however, held that this section was not applicable.

and that the witness might have been punished under section 175, Penal Code, or section 480, Code of Criminal Procedure. He could also, if guilty of falsehood, have been prosecuted for giving false evidence in a judicial proceeding (*In re Prem Chand Daulatram*, I. L. R. 12 Bom. 63).

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

The practice in England is not to cross examine, except under special circumstances, witnesses called merely to speak to the character of a prisoner; but there is no rule which forbids the cross-examination of such witnesses.

Leading questions.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

Mr. Bentham defines a *leading question* to be one which indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him?—and he observes that, under this form, every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner while he pretends ignorance and is asking for information is in reality *giving*, instead of *receiving*, it. This kind of leading question has been otherwise described as a question which embodies a material fact which may or may not have been before known to the witness, and admits of a conclusive answer by a simple negative or affirmative. Such a question ought not to be put even in cross examination, unless under special circumstances—and it will be observed that this definition of the terms "leading question" is somewhat different from that given in The Indian Evidence Act, which provides in section 143, *post*, that leading questions may be asked in cross-examination.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

"To abridge the proceedings and bring the witness as soon as possible to the material points on which he is to speak, the Counsel," says Mr. Taylor, "may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule,

therefore, is not applied to that part of the examination which is merely introductory of that which is material. With respect even to material points, the Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination, as for instance, where the witness, by his conduct in the box, obviously appears to be *hostile* to the party producing him, or *interested* for the other party, or *unwilling* to give evidence. Indeed, if the witness stand in a situation which of necessity makes him adverse to the party calling him, as if he be a *defendant* whom the plaintiff wishes to examine,[9] leading questions may, it seems, be asked him as a matter of right. . . . . Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection*,[1] which *suggestion* may assist. Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognize them if suggested, this was permitted to be done. So, for the purpose of *identification*, the witness may be directed to look at a particular person[2] and say whether he is the man. So where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another respecting the contents of a lost letter, and cannot off-hand recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted. So, where a witness is called to *contradict* another, who has denied having used certain expressions, Counsel are sometimes permitted to ask whether the particular words denied were not in fact uttered by the former witness; but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible. Again, the Court will sometimes allow a pointed or leading question to be put to a *witness of tender years*, whose attention cannot otherwise be called to the matter under investigation; and, indeed, it must always be remembered that the Judge has a discretionary power—not controllable on a bill of exceptions—of relaxing the general rule, whenever and under whatever circumstances and to whatever extent he may

Leading questions when usually allowed in examination-in-chief.

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[9] As in *Radha Jiban Mustafi* v. *Tara Mani Dasi* (12 Moo I. A. 380), where this part of the rule was recognized.

[1] "It may frequently happen," says Mr. Starkie, "that a witness, unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters sworn to have been made in the course of a conversation."

[2] If, however, the witness was suspected, this would be improper, and the witness should be told to look round the Court and say if he there saw the person of whom he was speaking. Much depends upon the circumstances of each particular case. For example, if the defence were an *alibi*, it would be clearly improper to ask the witness, "Did you see the prisoner there?"—a question which would be perfectly proper if the defence were that the prisoner, though present at the spot, had no share in the alleged offence.

think fit, though the power should only be exercised so far as the purposes of justice plainly require."[3] Compare section 1842 of the New York Civil Court:—"A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it." See also section 154, *post*.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, "it is generally the easiest course," says Mr. Starkie, "to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood: and, therefore, his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time."[4] So Mr. Alison says:—"It is often a convenient way of examining, to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that state of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining Counsel."[5]

In order to object properly or successfully to questions as leading, it is important to form an accurate idea of what a *leading question* really is. "I wish," said Lord Ellenborough in a case[6] before him, "that objections to questions, as leading, might be a little better considered before they are

[3] §§ 1268A, 1263; §§ 1404, 1405, 8th edn.
[4] Starkie on *Evidence*, p. 167.
[5] Alison's *Practice of the Criminal Law of Scotland*, 546.
[6] *Nicholls* v. *Dowding and Kemp*, 1 Starkie's Nisi Prius Rep. 81.

made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions be asked to which the answer 'yes' or 'no' would be conclusive, they would certainly be objectionable: but, in general, no objections are more frivolous than those which are made to questions as frivolous."

When they may be asked.

143. Leading questions may be asked in cross-examination.

In order to understand accurately the effect of this section, it will be necessary to bear in mind the definition of a "leading question" given in section 141, *ante*. There are some questions called *leading* in loose parlance, which ought not to be put even in cross-examination. "With respect to the mode of conducting a cross-examination," says Mr. Taylor, "it is admitted on all hands, that *leading questions may* in general *be asked*; but this does not mean that the Counsel may go the length of putting the very words into the mouth of the witness which he is to echo back again;[7] neither does it sanction the putting of a question which assumes that facts have been proved, which have not been proved, or that particular answers have been given contrary to the fact."[8]

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is whether A assaulted B.

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[7] In *R.* v. *Hardy* (24 Howell's State Trials, 755) Mr. Justice Buller said:—"You may lead a witness on cross-examination to bring him directly to the point as to the answer; but must not go the length, as was attempted yesterday, of putting into his mouth the very words which he is to echo back again."

[8] § 1288; § 1431, 8th edn.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

With this section should be read sections 65 and 91, *ante*.

"*The adverse party may object*," &c. But if the case is tried in a Court in which there are no properly qualified practitioners, or if none be employed in the case, or if the adverse party, himself ignorant of the law and of his privilege, do not object—should the Court disallow the evidence until the document be produced or until facts have been proved which entitle the party concerned to give secondary evidence? In criminal cases tried under the provisions of the Code of Criminal Procedure, Act X of 1882, the Court should certainly do so, for section 256 of that Code declares it to be the duty of the Judge, *in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties*. In civil cases there may be more doubt, the Code of Civil Procedure containing no express provision on the subject. See, however, the last portion of the second proviso to section 165 of The Evidence Act, *post*; and consider the effect of section 59, of "must" in section 64, of section 65, and of "shall" in section 66, *ante*.

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

This section is word for word nearly the same as section 24 of *The Common Law Procedure Act*, 1854 (17 & 18 Vict. cap. 128), which, however, contains the following additional proviso, *viz.*—"Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." This proviso is, however, substantially contained in section 165, *post*. The above section of *The Common Law Procedure Act*, 1854, altered the rule laid down in *The Queen's* case,* *viz.*, that before the witness can be cross-examined as to the contents of a document, the cross-examining Counsel must produce it as his evidence and have it read. This rule, as Mr. Taylor remarked, excluded one of the best tests by which the memory and

Rule laid down in *The Queen's* case altered.

* 2 Brodrip and Bingham's Rep. 286.

integrity of a witness can be tried, it being clear that, if the object of the cross-examination was to test the witness's memory, this would be entirely frustrated by reading out the letter to him before asking him any question about it. It was, however, only in accordance with the general principles which forbids all use of the contents of a written instrument until the instrument itself be produced. Mr. Day, speaking of the section of *The Common Law Procedure Act*, 1854, remarks: "The effect is this; the witness, in the first instance, may be asked whether he has made such and such a statement in writing, without its being shown to him. *If he denies that he has made it*, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him), and to any parts of it relied upon as a contradiction. *If the witness, instead of denying that he has made the statement*, admits it, although the object of the cross-examining Counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury. If he is aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, *without its being produced*, on the general rule that if part of any connected conversation or statement be given, the whole may be used; or he may ask the Judge, under the latter part of the section,[1] to require the production of the writing. It must *be always* borne in mind that this section is confined to written statements *made by the witness* relative to the subject-matter of the cause. This section, therefore, does not interfere with the decision in *Macdonnell* v. *Evans* (11 C. B. 930). In that case, upon the cross-examination of a witness, a letter in his own handwriting was shown to him, and he was asked 'did you not write that letter *in answer to a letter charging you with forgery?*' It was held that the question was inadmissible for *any* purpose, inasmuch as it was an attempt to get at the contents of a written document which might have been produced. As the question, therefore, referred to the contents of a letter written by a third person, and not by the witness, the case is not affected by this section. It is right to notice this, as the Commissioners, in their second report, apparently refer to the case of *Macdonnell* v. *Evans* as one of the judicial decisions proceeding on the rule, which is now superseded."[2]

Alteration of the law.

Where a party gave evidence in his own case, it was held by a majority of two out of three Judges that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was, notwithstanding, against him, and this, without producing the record of the proceedings in the previous case (*Hanman* v. *Lester*, 31 Law Journal Rep. C. P. 366).

What course is to be pursued, if the document has been *lost* or *destroyed*, and whether in these or in any other cases a *copy* can be used instead of

[1] In India under section 165, *post*.
[2] Day's *Common Law Practice*, p. 214.

the *original*, are points upon which the English and Indian Acts are alike silent.

In a Bombay case, *Manchershaw Bezonji* v. *The New Dhurumsey S. and W. Company*, I.L.R. 4 Bom. 576, it appeared that a witness had been employed by another person to make entries in that other person's cash books which he did either from loose memoranda or the oral instructions of that other person. It was proposed to contradict the witness under the provisions of this section by these entries. It was, however, held that this could not be done, as they could not be regarded as the statements of the person who wrote them, but were rather the previous statements of the other person from whose memoranda or oral dictation the witness wrote them.

The English enactment does not apply to Criminal Courts. The section of the Indian Act applies to all Courts, civil or criminal; and its provisions could, therefore, be applied at trials before the Court of Session to depositions taken before the committing Magistrate. "In criminal cases," says Sir J. F. Stephen, speaking of the practice in England, "the old rule still applies.[8] Its most frequent application in practice is that the prisoner's Counsel is prevented from asking the witness whether in his deposition before the Magistrate he did not give a different account, unless he puts in the deposition as his own evidence, and so gives the prosecutor the right to reply. This is not really a grievance; for if the contradiction is serious, there is no reason why the depositions should not be put in. If it is trifling, the rule saves time and checks quibbling. Moreover, *the Judge will frequently look at the depositions himself*, and, if he thinks the contradiction important, will read them, which does not give the prosecutor a reply. . . . . This rule is at present in the course of being relaxed in practice. Some Judges act on the principle that the depositions are always in evidence, and allow Counsel to cross-examine on them without putting them in. Mr. Justice Willes acted on this principle on the Midland Circuit throughout the whole of the Lent Assize of 1863"—(*View of the Criminal Law of England*, p. 316). Mr. Taylor observes that the rules were intended chiefly to check the license of Counsel, and are not binding on the Judges themselves, who have a discretionary power of questioning a witness as to any *discrepancy* between his evidence in Court and his former statement without putting in the depositions. The practice in England being thus not definitely settled, let us see what is the practice in India. In the case of *Queen* v. *Binaban Baurí* (5 W. R. Cr. 54) the Calcutta High Court suggested that the Sessions Judge should have before him the depositions taken by the committing Magistrate; and, comparing the statements of the witnesses there recorded with the evidence of the same witnesses as given at Sessions, should put questions, the answers to which may clear up discrepancies or possibly elicit

Practice in criminal cases as to depositions.

Practice in India.

[8] The rules on the subject laid down by the Judges will be found in Mr. Taylor's work, § 1304; § 1449, 8th edn.

facts favourable to the prisoner. The depositions taken by the committing Magistrate are always sent up and are with the Sessions Judge during the trial. The accused can, if he wishes, have a copy of these depositions (see section 548 of the Code of Criminal Procedure). He, or his Counsel, or Pleader can therefore inform himself of what the witnesses said before the Magistrate, and is in a position to question any witness who varies in the Court of Session from his former statement. The Sessions Judge ought, if asked, to allow the original deposition to be used for this purpose. Where the Sessions Judge himself noticed the discrepancy and it was material, there can be little doubt that, in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of The Evidence Act and of the Code of Criminal Procedure.

In one case, *Empress* v. *Haran Charan Mitra*, 6 C. L. R. 390, one of the witnesses for the prosecution was asked if he had made a certain statement before the Magistrate. *Wilson, J.*, said it was unnecessary to ask this question as the depositions showed what the witness had said before the Magistrate, and added that the attention of the jury might be called to differences in the witness's statements without putting in his previous deposition. The correctness of this ruling may be doubted. It would seem to be contrary to the provisions of this section of The Evidence Act. If it is intended to contradict a witness by his previous deposition, such passages of it as are used for this purpose should, it is apprehended, be tendered in evidence. As previously pointed out (*ante*, p. 619) this does not in this country give the prosecutor a right of reply.

In connection with the subject it will further be important to consider the provisions of section 238 of the Code of Criminal Procedure, for which see *ante*, page 203; and also of section 172 of the same Code. The latter section is as follows :—" Every Police-officer, making an investigation under this chapter, shall, day by day, enter his proceedings in the investigation in a *diary*, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. Any Criminal Court may send for the Police-diaries of a case under inquiry or trial in such Court, and *may use such diaries not as evidence in the case but to aid it in such inquiry or trial.*[4] Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court: but *if they are used by the Police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police-officer*, the provisions of The Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply."

Police diaries.

[4] *i.e.*, not to use them as evidence but to discover further evidence or possible sources of evidence, which, if brought before the Court, may throw additional light upon the guilt or innocence of the accused.

The accused cannot insist on a Police-officer refreshing his memory by referring to his diaries, and a Sessions Judge is not bound to compel him to do so: *In re Kali Charan Chumari*, I. L. R. 8 Calc. 154: 10 C. L. R. 51; and *In re Jhabu Mahton*, I. L. R. 8 Calc. 739: 12 C. L. R. 233. But the statements of witnesses recorded by a Police-officer while making an investigation under section 161 of the Code of Criminal Procedure form no portion of the Police-diaries referred to in section 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon: *Bibao Khan* v. *Queen-Empress*, I. L. R. 16 Calc. 610: *in the matter of Mahomed Ali Haji* v. *Queen-Empress*, I. L. R. 16 Calc. 612. A Police-officer cannot by entering in his diary, kept under section 171, Criminal Procedure Code, statements of witnesses recorded by him under section 161, Criminal Procedure Code, protect them from such use as the law allows, *e.g.*, under sections 145 and 159 of The Evidence Act: *Sheru Sha* v. *Queen-Empress*, I. L. R. 20 Calc. 642.

Right to inspect document shown to witness.

"Questions not unfrequently arise," says Mr. Taylor, "as to whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, or respecting the character of the handwriting, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, a sight of the document may then be demanded by the opposite Counsel." (§ 1307, § 1452, 8th ed.) This right must be exercised before or at the moment when the witness uses the document to refresh his memory. If the opposite party neglects then to exercise his right, he cannot continue to retain it throughout the whole of the subsequent examination of the witness: Per *Field, J.*, in *in re Jhabu Mahton*, I. L. R. 8 Calc. 739; 12 C. L. R. 233.

The section at present under notice relates to previous statements *made in writing or reduced into writing*. If, however, the previous statements have been *verbal* and not reduced to writing, they may be proved in order to contradict, if only they be relevant to the issue* (see para. 2, section 155, *post*). Whether the witness's attention must first be drawn to a previous verbal statement, and whether he must be asked if he made such a statement before his credit can be impeached by independent evidence, is a point not provided for by The Indian Evidence Act; but there can be little doubt that here also the circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned

Previous verbal statements.

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* As to contradicting a witness by contradictory oral statements made to the Police, see *Reg.* v. *Uttamchand Kapurchand* 11 Bom. H. C. Rep. 120.

to the witness, and he ought to be asked whether or not he made such a statement. Where, as so frequently happens in India, a witness neither denies nor admits having made a former contradictory statement, but replies that he does not remember, the following provision of *The Common Law Procedure Act*, 1854 (section 23), is most useful, and might well have been introduced into the Act, *viz.* —"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, *does not distinctly admit* that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity;

(2) to discover who he is and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

The words "*in addition to the questions hereinbefore referred to*" in section 146 are to be read with para. 2 of section 138, *ante*, which provides that the cross-examination must relate to *relevant* facts, although it need not be confined to the facts to which the witness testified in his examination in chief. In addition, then, to questions which relate to relevant matters, a witness may further be asked the questions mentioned in section 146. But these latter questions may or may not relate to relevant matters. If they relate to *relevant* matters, the witness must answer, whether or not his answer will criminate him or tend to criminate him, or expose or tend directly or indirectly to expose him to a penalty or forfeiture of any kind (sections 132 and 147),* and *evidence will be admissible to contradict his answer*. If the questions relate to *irrelevant* matters, it will, generally

* It may be observed that it may amount to *defamation* in India and to libel in England to publish even the truth about a person when the truth is so old that it cannot be for the public good that it be made known: see Exception 1 to section 499 of the Indian Penal Code: and 6 & 7 Vict. cap. 96, section 6.

speaking, be in the discretion of the Court to compel him to answer or not (section 148), and evidence will *not be admissible to contradict the answer when given*, unless in the cases provided for by the *Exceptions* to section 153, *post*. This is all in general accordance with the rules of English law on the same subject. See *Queen* v. *Gopal Das*, I. L. R. 3 Mad. 280. But no question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him: (Taylor, § 1292, § 1435, 8th edition). It is only with regard to relevant matters that a witness can be contradicted by proof of previous inconsistent statements reduced to writing (see sections 145 and 155 (3), and *Khadijah Khanum* v. *Abdul Karim Sheraji*, I. L. R. 17 Calc. 344).

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies:—

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

The words "*not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character*" in the above section

would seem to be synonymous with the words "*relevant to the inquiry only in so far as it tends to shake his credit by injuring his character*" in section 153, *post*; and the result appears to be, that section 148 assumes it as a general proposition that *a witness cannot be compelled to answer irrelevant questions*; and section 153 assumes it as a further general proposition that, *if a witness do answer an irrelevant question, his answer cannot be contradicted by other evidence, but that his answers to relevant questions may be so contradicted.* Section 148 then provides, that when a question, although irrelevant, affects the credit of the witness by injuring his character, the Court shall have a discretion (for the exercise of which certain rules are laid down) as to compelling an answer; and section 153 enacts, that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply, save and except in two cases; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence. It may be observed that this provision as to a charge for giving false evidence is unnecessary in India, where it is not essential in order to a prosecution for "*giving false evidence,*" according to the definition of this offence in the Penal Code, as it is in England to a prosecution for *perjury*, that the matter charged as false should have been material to the issue.

If a witness, compelled to answer, or prevented?

If the witness, either of his own accord or being compelled by the Court, answer a question which is irrelevant, or which is relevant only in so far as it affects his credit, and if such question criminate him or expose him to a penality or forfeiture, is he entitled to the protection afforded by section 132, *ante*? It would appear that he is not. But it is submitted that the protection should be extended to such a case.

The second proviso to section 165, *post*, should be borne in mind in connection with this section.

With reference to clause (2) it may be observed that where the facts which form the subject of the question are comparatively *recent*, they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. "The interests of justice," says Mr. Taylor, "can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant."[1]

With reference to clause (4), see Illustration (*h*), section 114, *ante*, and also the other matter which may be considered in connection with the same Illustration. Mr. Taylor observes as follows:—"It has been stated more than once, that, if the witness declines to answer, no inference of the truth

[1] It might almost appear that section 147 is superfluous, unless it was intended that a distinction is to be made between "*relevant to the suit or proceeding*" in section 147, and "*relevant to the matter in issue in any suit or in any civil or criminal proceeding*" in section 132.

of the fact can be drawn from that circumstance; but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness. A perfectly honorable but excitable man may occasionally repudiate a question which he regards as an insult, and to infer dishonor from his conduct would, of course, be unjust; but, generally speaking, an honest witness will be eager to rescue his character from suspicion and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory.*"

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Illustrations.

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dákáit. This is a reasonable ground for asking the witness whether he is a dákáit.

(*b*) A pleader is informed by a person in Court that an important witness is a dákáit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dákáit.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dákáit. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dákáit.

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other

* § 1321, § 1467, 8th edn.

authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

History of these sections.

These sections were substituted while the Bill was in Committee for certain other sections in the original draft, which, said Sir J. F. Stephen in his speech on the passing on the Bill, "provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that, if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation, subject of course, to the various rules about defamation laid down in the Penal Code. To ask such question without instructions was to be a contempt of Court in the person asking them, but was not to be defamation." Sir J. F. Stephen proceeded to remark:—"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposals were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place, and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the character of witnesses should be open to full inquiry. These reasons satisfied the Committee and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them, which I think will in practice be found sufficient." Speaking, then, of the substituted sections, including sections 146 to 152, he said:—"The object of these sections is to lay down, in the most distinct manner, the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honorable advocates and by the public."[9]

See the second proviso to section 165, *post*.

In *Sullivan* v. *Norton*, I. L. R. 10 Mad. 28, it has been decided that an advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate.

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[9] *Proceedings of the Legislative Council of India*, pages 237-238 of the *Supplement to the Gazette of India* of 30th March 1872.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy.

These sections are in general accord with English law, which is, however not quite settled on the subject of *degrading* questions. The result of section 151 will be, that the Court cannot forbid *indecent* or *scandalous* questions if they *relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.* If they have, however, merely *some bearing on the questions before the Court*, the Court has a discretion, and *may* forbid them. "If a woman," says Sir J. F. Stephen, in his *General View of the Criminal Law of England*, "prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child ten years before, though circumstances *might* exist which might render such an inquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason."

Where a question is intended to *insult* or *annoy*, or is *needlessly offensive in form*, it is made the duty of the Court to interpose for the protection of the witness.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

See for a similar example *Reg.* v. *Shakharam Mokundji*, 11 Bom. H. C. Rep. 169.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) A is asked whether his family has not had a blood feud with the family of B, against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

"With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down," says Mr. Taylor, "that if the questions relate to *relevant* facts, the answers may be contradicted by independent evidence; if to *irrelevant*, they cannot."[1] The Indian Evidence Act does not lay down this rule anywhere in so many words; but the provisions of the Act as to *relevancy* and other matters necessarily involve this rule (see *ante*, pages 643, 644). Mr. Taylor further remarks that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not

[1] § 1295, § 1438, 8th edn.

connected with the cause or the parties.[2] The Indian Evidence Act adopts the same principle. The exceptions to the rule contained in the above section are taken from English law—the *first*, from the 25th section of *The Common Law Procedure Act*[3] 1854, which enacts that a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction;[4] the *second*, being in accordance with a strongly intimated opinion of the Barons of the Exchequer in the case of *The Attorney-General* v. *Hitchcock*.[5]

Question by party to his own witness.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

In the exercise of the discretion here conferred, the Court will properly allow such questions to be put, when a witness unexpectedly turns out to be hostile to the party who calls him, or is manifestly interested for the other party, or is unwilling to give evidence; or if the witness stand in a situation which naturally makes him adverse to the party who desires his testimony, as, for example, a defendant called as the plaintiff's witness (*Radha Jiban Mustafi* v. *Tara Moni Dasi*, 12 Moo. I. A. 380), or a plaintiff called as the defendant's witness.

In America a rule prevails which is the converse of the above. A Judge may, in his discretion, prohibit leading questions from being put to an adversary's witness who shows a strong interest or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favorable to his cause. The Indian Evidence Act does not contain any similar provision. The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not make him hostile: *Kalachand Sahai* v. *Queen-Empress*, I. L. R. 13 Calc. 53.

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

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[2] § 1295, § 1438, 8th edn.

[3] 17 & 18 Vict. cap. 128.

[4] The rest of this section relates to the mode of proving the conviction by a certificate, as to which, in India, see s. 511, Criminal Procedure Code.

[5] 1 Welsby, Hurlstone, and Gordon's Exch. Rep. 94—102.

(2) by proof that the witness has been bribed, or has [accepted[6]] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief; but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a*) A sues B for the price of goods sold and delivered to B.

C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

It was laid down by Lord Ellenborough in *R.* v. *Watson* (2 Stark. 149), that the only modes of *impeaching the credit* of a witness are by cross-examination, by producing the record of his conviction of some infamous crime, or by adducing general evidence that he is unworthy of belief upon his oath. See also *Spencely* v. *De Willott*, 7 East. 108. In the case of *The Attorney-General* v. *Hitchcock* (1 Exch. Rep. 91) a witness, who had given material evidence for the Crown on the trial of an information under the revenue laws, was asked in cross-examination whether he had not *said* that the officers of the Crown had *offered* him £20 to give that evidence. He denied that he had ever said so, and the Court held that evidence was not

[6] The word in brackets was substituted for "had" by section 11 of the amending Act, XVIII of 1872.

admissible to contradict him.[7] The question was irrelevant to the suit and the usual rule was followed that the answer to an irrelevant question cannot be contradicted. The *offer* of a bribe not shown to have been accepted would be no ground for impeaching the impartiality of the witness (see Exception 2, section 153, *ante*): but the fact of a witness having accepted a bribe, or the promise of a bribe, is a ground upon which the credit of a witness may very reasonably be impeached, and the second clause of the above section embodies this view.

It may be important to distinguish between *contradicting a witness* and *impeaching the credit of a witness*—expressions which are sometimes used as synonymous, but between which a distinction appears to be made by The Evidence Act. Mr. Taylor states (§ 1324: § 1470, 8th edn.) the first of the modes in which the *credit of a witness may be impeached* to be, that witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue; and the omission of this mode in the above section of The Evidence Act appears to have suggested doubts[8] as to whether the Indian Legislature did or did not intend to allow the testimony of a witness to be contradicted by other evidence disproving the facts stated by him. It has been already shown (*ante*, pages 643, 648) that, where these facts are relevant, The Evidence Act assumes that evidence may be given to contradict; and while declaring generally that evidence may not be given to contradict the answers to questions, which are relevant to the inquiry only in so far as they tend to shake the credit of a witness by injuring his character, the Act makes two exceptions[9] to this rule (Exceptions 1 and 2, section 153). That The Evidence Act nowhere lays down a general rule that the testimony of a witness may be contradicted by evidence disproving the facts stated by him, is perhaps because this is a rule not so much of evidence as of procedure. It is not the fact that, in all cases and under all circumstances, the testimony of a witness as to relevant facts can be contradicted by evidence disproving such facts. In *R.* v. *Hilditch*, (5 C. & P. 299) it was laid down, that evidence, which is a confirmation of the original case, cannot be given as

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[7] The following case carried this rule to its extreme limits:—On a trial for rape in Ireland, a witness was called for the prisoner who, professing his ignorance of English, was sworn in Irish, and had the advantage (important to a dishonest witness) of giving his evidence through an interpreter. He was pressed in cross-examination as to his knowledge of English, and was asked if he had not recently spoken English to two persons present in Court. He denied it—and it was held by seven out of ten Judges, that these two persons could not be called to contradict him (*R.* v. *Burke*, 8 Cox's Criminal Cases 44).

[8] See the observations in *Reg.* v. *Sakharam Mukundji*, 11 Bom. H. C. Rep. 169.

[9] In these two exceptional cases the evidence is allowed to contradict answers to *questions actually put*. The evidence allowed by section 155 to impeach the witness' credit may apparently be given, although the witness has not been questioned upon the point, unless some other portion of the Act prohibit it—see, *e.g.*, section 145. The words "liable to be contradicted" in clause 3 of section 155 can scarcely be limited to the two exceptional cases, which form the exceptions to section 153.

evidence in reply; and that the only evidence which can be given in reply is that which goes to cut down the defence without being any confirmation of the original case. "If several issues be joined," says Mr. Taylor, "some of which lie on either party, the plaintiff may, at his option, go into the whole case in the first instance, or he may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the right of rebutting his adversary's proof in the event of the defendant establishing a *primâ facie* case with respect to the issues which lie upon him. The latter course is the one which, in practice, is most usually adopted, and the defendant may then have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. *If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence in reply*; for if such a privilege were allowed to the plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length. . . . . It is tolerably clear that, where there is only one issue, the onus of proving which lies on the plaintiff, he must put forth all his evidence in the first instance and cannot rely on a *primâ facie* case, and, after that case has been shaken by the defendant's proof, call other evidence to confirm it. . . . In deciding upon the admissibility of evidence called in reply, regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the Judge in the exercise of his discretion."[1] Whether then evidence may be given to disprove relevant facts deposed to by a witness depends upon the mode in which an advocate elects to conduct his case. The rules now provided by the Code of Civil Procedure, see *ante*, pp. 617, 618, are substantially those set forth by Mr. Taylor.

When party may discredit his own witness.

The credit of a witness may be impeached not only by the adverse party, but also, *with the consent of the Court, by the party who calls him*. This provision is analogous to that contained in the previous section which allows a party under certain circumstances to cross-examine his own witness. "The question how far a party is at liberty to discredit his own witness," says Mr. Taylor, "is one which for years has been agitated in Westminster Hall, and which at length has been settled by the Legislature. *The Common Law Procedure Act* of 1854 contains, in § 22, the following salutary, though ill-drawn, enactment on this subject:—'A party producing a witness shall not be allowed to impeach his credit by *general evidence* of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse (i.e. *hostile*, as contradistinguished from being merely *unfavorable*), contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with

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[1] §§ 357—359; §§ 385—387, 8th edn., and see the authorities ther referred to.

his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he had made such statement.'" This enactment has been in great part borrowed from the New York Civil Code. In India proof may be given of former statements made by the witness and inconsistent with any part of his evidence which is liable to be contradicted. If such statements were made in writing, or reduced into writing, the witness's attention must have been called to those parts of it which are to be used for the purpose of contradicting him, before such proof can be given (section 145, *ante*). If they are verbal merely, and not in writing, there is no express similar restriction in the Act.

"It occasionally happens," says Mr. Day (*Common Law Practice*, p. 203), "that a witness called under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party calling the witness was *not precluded from proving by other testimony what the witness had negatived: but whether he ought to be allowed to discredit his own witness*, either by impeaching his character or by showing that he had previously made statements at variance with the evidence given by him, was a point upon which the decisions of the Courts were conflicting." That evidence to discredit ought to be admitted under such circumstances was strongly argued by Lord Denman in the case of *Wright* v. *Beckett* (1 Moody and Robinson's Rep. 414). "If," said His Lordship, "the witness professing to be mine has been bribed by my adversary to deceive me—if having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly-invented falsehood which defeats my just right, and throws discredit on all my other witnesses, must I be prevented from showing the jury facts like these? Suppose that, in some dispute happening in the street, a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless, but when sworn in open Court takes part with his adversary. The question then is, whether *he* is to be believed or the *other witnesses* of the same party. Some one in Court happens to know him and whispers to the attorney—'He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner; moreover, he has been for years notoriously infamous.' Or suppose such a trial for misdemeanour as some that have lately revolted the public mind; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against discrediting your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in

the witness-box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which, from whatever motive, he has fallen? It is clear that, in civil cases, the exclusion might produce great injustice and in criminal cases improper acquittals and fraudulent convictions." These arguments convinced the English Law Commissioners of 1850.

The words "which is liable to be contradicted" in section 155 (3) of The Evidence Act mean "which is relevant to the issue;" per *Wilson, J.*, in *Khadijah Khanum* v. *Abdul Karim Shirazi*, I. L. R. 17 Calc. 344. A witness who has made a statement to a Police-officer investigating a case under Chapter XVI, Criminal Procedure Code, can properly be questioned about that statement; and, though the statement itself cannot be used as evidence either for (*Raghuni Singh* v. *Empress*, I. L. R. 9 Calc. 458: 11 C. L. R. 571) or against (section 162, Criminal Procedure Code) the accused, the Police-officer who recorded the statement or any person in whose hearing it was made, can be examined with regard to it with the view of impeaching the credit of the witness: *Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. Rep. 120: *Queen-Empress* v. *Sitaram Vithal*, I. L. R. 11 Bom. 657: *Queen-Empress* v. *Ismal Valad Fataru*, I.L.R. 11 Bom. 659: *Queen-Empress* v. *Madho*, I.L.R. 15 All., 25: *Bikao Khan* v. *Empress*, I.L.R. 16 Calc. 610: and *In the matter of Mohamed Ali Hajt* v. *Empress*, I. L. R. 16 Calc. 612. A Police-officer cannot be compelled to refresh his memory from such a document: *In the matter of the petition of Kali Charan Chunari*, I.L.R. 8 Calc. 154: 10 C. L. R. 51. Police diaries cannot be called for by the accused (section 172, Criminal Procedure Code); but a Police-officer cannot by recording in his diary the depositions of witnesses taken down by him under section 161, Criminal Procedure Code, protect them from being used by the accused in accordance with the provisions of the law: *Sheru Sha* v. *Queen-Empress*, I. L. R. 20 Calc. 642. These observations are, however, not applicable to a first information report recorded under the provisions of section 154, Criminal Procedure Code; this being a document required by law to be reduced to writing, the document itself must be produced, and secondary evidence of its contents cannot be given.

Questions tending to corroborate evidence of relevant fact, admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents, unconnected with the robbery, which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

According to the practice in England, evidence of prior statements is not generally admissible to corroborate a witness. "His having given a contrary account," says Mr. Starkie, "although not upon oath, necessarily impeaches either his veracity or his memory: but *his having asserted the same thing* does not in general carry his credibility further than, nor so far as, his oath."[2] Chief Baron Gilbert was, however, of opinion that the party who called a witness, against whom contradictory statements had been proved, might show that he had affirmed the same thing before on other occasions, and that he was therefore '*consistent with himself*;'[3] and this opinion was followed in section 31 of the repealed Act, II of 1855, the provisions of which have been simplified and reproduced in the above section. The statement, which may be proved under the section in order to corroborate, may be a statement made either on oath or otherwise, and either in ordinary conversation or before some person who had authority to question the person who made it. It may also be verbal or in writing. If not made before any person legally competent to investigate the fact, it would seem that it must have been made *at or about the time when the fact took place*. In India, perhaps more particularly than in other countries, the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the Police or others, are important to the ascertainment of truth.

See *Illustrations* (*j*) and (*k*) to section 8, *ante*, p. 93.

When it is wished to corroborate a witness by a previous deposition, or by a first information report, recorded under section 154, Criminal Procedure Code, these documents must be produced, for they are documents required by law to be reduced to writing, and secondary evidence of their contents cannot be given (see section 91, *ante*, p. 416.) Under this section the deposition of

[2] Starkie on *Evidence*, p. 253. [3] Gilbert on *Evidence*, p. 135.

a witness given at a previous trial when the accused person was absconding, but with regard to whom the Magistrate had omitted to record that he was absconding, was admitted in corroboration of the witness's evidence given at the subsequent trial: *Queen-Empress* v. *Ishri Singh*, I. L. R. 8 All. 672.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

See *Reg* v. *Uttamchand Kapurchand*, 11 Bom. H. C. Rep. 120: *Empress* v. *Samiruddin*, I. L. R. 8. Calc. 211. 10 C. L. R. 11; *Raghuni Singh* v. *Empress*, I. L. R. 9 Calc. 455: 11 C. L. R. 569; *Queen-Empress* v. *Sitaram Vithal*, I. L. R. 11 Bom. 657. In *in the matter of the petition of Kali Charan Chunari*, I. L. R. 8 Calc. 154: 10 C. L. R. 51, it has been pointed out that there is "no authority for saying that a witness can be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness or is at least

such as he can insist on having produced.* In *in the matter of the petition of Jhabu Mahton*, I. L. R. 8 Calc. 739, 12 C. L. R. 233, it has been observed by *Field, J.*, that "the grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold: (*i*) to secure the full benefit of the witness's recollection as to the facts: (*ii*) to check the use of improper documents, and (*iii*) to compare his oral testimony with his written statement." In this case it was further observed that "the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory: and that it was wholly within his discretion whether he should do so or not."

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party, if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

The committing of a statement of any kind to writing, as remarked by Mr. Bentham, calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence, which forms the subject of the statement, or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth—more reliable than "slippery memory." It is not necessary that the witness, after having seen the writing, should have any *independent or specific recollection* of the facts stated therein. It will be sufficient if he remembers that he has seen the paper before, and is sure that when he saw it, the *facts were correctly recorded therein* (section 160). It has even been held to be sufficient if the witness, having no recollection of the circumstances, or of having before seen the paper, can recognize his signature or writing, and so vouch for the accuracy of the memorandum. These points, though they do not affect the *admissibility* of the evidence, must yet be considered in

deciding on the amount of *value* to be assigned to it. Where the witness had become *blind* since the writing was made, it was held that it might be read over to him. A writing used to refresh the memory of a witness does not thereby itself become evidence. It is not necessary, therefore, that the writing should be *admissible* in evidence in order to be used. Thus, a receipt, which cannot be put in for want of a stamp, may be used by a witness to refresh his memory. Section 159 substantially follows the English rule as *to the time when the writing must have been made*, this rule being that a writing can be used to refresh the memory of a witness only where it has been made or its accuracy recognized *at the time of the fact in question, or, at furthest, so recently afterwards as to render it probable that the memory of the witness had not then become defective.* In one case a witness was not allowed to look at notes, prepared some weeks after the transaction, and when he had reason to believe that he would be called upon to give evidence. If the memoranda were prepared subsequently to the event at the instance of the party calling the witness, they would be inadmissible, for otherwise a door might be opened to the greatest fraud. Under Indian, as well as English, law the writing may have been made by *some other person*, provided the witness examined it and knew it to be correct when the facts were fresh in his mind. Thus, a witness at Sessions might be shown his former deposition before the committing Magistrate, in order to refresh his memory, a couple of months after, if such first deposition were taken immediately after the occurrence. So, in England it has been ruled that where a witness called on behalf of a prosecution makes a statement in his examination-in-chief inconsistent with what he has previously sworn before the Magistrates or the Coroner, the Counsel for the Crown may show him his deposition for the purpose of refreshing his memory, and may then repeat the question in a leading form: *R.* v. *Williams*, 6 Cox, 343: Taylor, § 1267, § 1410, 8th edn.

Rules as to refreshing memory discussed.

A Police-officer, called as a witness to prove facts seen or discovered during his investigation, may look at notes of the investigation made by himself or another Police-officer who accompanied him, though such notes would of themselves be inadmissible in evidence (*Empress* v. *Raghuni Singh*, I. L. R. 9 Calc. 455: 11 C. L. R. 569: *Queen-Empress* v. *Sitaram Vithal*, I. L. R. 11 Bom. 657: *Queen-Empress* v. *Ismail Valad Fataru*, I. L. R. 11 Bom. 659. See sections 161-162 of the Code of Criminal Procedure, and as to Police diaries, section 172 of the same Code). An accused person under trial is not entitled to insist that the diary, if not in Court, shall be sent for, or, if it be in Court, shall be referred to, for the purpose of refreshing the Police-officer's memory (*In the matter of the petition of Kali Charan Chumari*, I. L. R. 8 Calc. 154: 10 C. L. R. 51: *In re Jhabu Mahton*, I. L. R. 8 Calc. 745: 12 C. L. R. 235.) See, however, section 94, Criminal Procedure Code. But he has a right to inspect statements of witnesses recorded by a Police-officer and to cross-examine the witnesses thereon: *Bikan Khan* v. *Queen-Empress*, I. L. R. 16 Calc. 610: *In the matter of Mahomed Ali Haji* v. *Queen-Empress*, I. L. R.

16 Calc. 612; and a Police-officer cannot, by entering statements of witnesses recorded by him under section 161 in his diary kept under section 172, Criminal Procedure Code, protect them from such use as the law allows, *e.g.*, under sections 145 and 159 of The Evidence Act (*Sheru Sha* v. *Queen-Empress*, I. L. R. 20 Calc. 642. When certain bonds on which a plaintiff sued had been destroyed by fire, it was held that a register kept by the plaintiff's gomashta of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, and the names of the attesting witnesses, though not secondary evidence of the contents of the bonds, might yet be referred to by a witness for the purpose of refreshing his memory: *Tarak Nath Mallik* v. *Jeamat Noshyo*, I. L. R. 5 Calc. 353. In *in the matter of the petition of Jhalu Mahton*, I. L. R. 8 Calc. 739, 12 C. L. R. 233 it was held by *Field, J.*, that the opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

Use of a copy to refresh memory.

"Whether the witness can refresh his memory by reference to a mere copy of his original memorandum, is," says Mr. Taylor, "a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled *to swear positively to the facts from his own recollection*; but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then it may be questionable whether the copy should be used, so long as the original is in existence and its absence unexplained; for there is much weight in the remark[a] of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself or be merely used to refresh the memory. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness *have no independent recollection* of the facts narrated therein, the original must be used. The case of *Burton* v. *Plummer* in no way contravenes this rule. There, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a *ledger*. The transactions in trade had been noted by a clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the same time checked by the clerk. Under these circumstances the Court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne* v. *Mackenzie*,[b]

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[a] In *Burton* v. *Plummer*, 2 Adolphus and Ellis's Rep. 344.
[b] 2 Adolphus and Ellis's Rep. 341.

the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

A document would be in the *custody* of a person who held it for another person, the owner thereof; and it might be said to be in the *possession* of either of such persons. It would be in the *power* of any person, who could effect its production, either personally or by means of his agent. It has been held by the Bombay High Court that a *partner* may be compelled to produce documents belonging to the firm in a suit in which his co-partners are not parties (*Jakaria* v. *Cazim*, I. L. R. 1 Bom. 498). The cases are here quoted and discussed, but the point is not free from doubt.

English law.

The rule of English law is similar, namely, that when a witness is served with a *subpœna duces tecum* (summons to produce documents), he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the Judge, who will decide upon the validity of any excuse that may be offered for withholding them. So the fact that the legal custody of the instrument belongs to another person will not authorize a witness to disobey the subpœna, provided the instrument be in his actual possession; but documents filed in a public office are not so in the possession of the clerk, as to render it necessary or even allowable for him to bring them into Court without the permission of the head of the office.[c]

Validity of objection how determined.

The validity of any such objection, i.e., *made by the person producing the document*, shall be decided on by the Court. The section does not contemplate the case of objections made by the opposite party, which must be determined by the usual rules. In order to decide on the validity of the objection, *the Court may take other evidence to enable it to determine on its admissibility.* "It frequently happens," says Mr. Taylor, "that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge, and adjudicated on by him *alone*"—(§ § 22, 23, 8th edn.) In cases tried with a jury, the province of the Judge in this respect remains the same (see section 298 of the Code of Criminal Procedure). The Court may, if it sees fit, *inspect the document, unless it refers to matters of State.* This is scarcely in accordance with the rule in England, where it has been decided that when an attorney claiming the privilege of his client objects to produce a document entrusted to him by such client, the Judge ought not to look at the writing to see whether it is a document which may properly be withheld. There have, however, been cases in which the Judge has inspected documents in order to decide upon

[c] Taylor, § 1121; § 1240, 8th edn.

their admissibility. If it be objected on the one side that it is impossible for a Judge who discharges the functions of Judge and jury, to avoid receiving some impression from the document if he *do* look at it, it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections, and effects a great saving of the time of the Court.

Official documents.

As to State documents, see *ante*, pages 577, 578. In the recent case of *Kain* v. *Farrer* (37 L. T. Rep. N. S. 469), the defendant was the Secretary to the Board of Trade, and the action was brought by a shipowner for the alleged wrongful acts of the servants of the Board in detaining a vessel on the ground that she was unseaworthy. An order for discovery of documents was made at the instance of the plaintiff. The defendant Secretary thereupon made an affidavit *that he had in his official control, custody or possession, as Secretary to the Board of Trade, certain official documents; and that he objected on the ground of public policy* to state anything further with respect to those documents. It was held that this affidavit was not sufficient: that there must be some ground for a Judge to exercise his discretion upon, and decide that a high officer of the State may, without giving any reason why, state that it is against the public interest that a particular document should be produced; that enough should be given to show that the mind of the Head of the department has been brought to bear upon the particular question, and that he thinks that it would be against public policy to do what is asked. "The common rule," it was said, "as gathered from *Beatson* v. *Skene*, and acted upon in a recent case[7] by Lord Coleridge, is that the Court is entitled to have the pledge and security of the Head Officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness-box and there say that he is the Head of the department and objects to such and such documents being produced, specifying them on the ground of public policy. The defendant in this case does not even say he is instructed by the Head of his department to refuse this discovery, though I have no doubt that that is in fact the case." In the case of *Trailokyanath Biswas and Ram Charan Biswas* (I. L. R. 3 Calc. 742), the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an enquiry made by the latter under the provisions of section 135 of the Code of Criminal Procedure, into the cause of a sudden and unnatural death. When the case came before the High Court, the District Magistrate appeared in Court with the report, ready to produce it, if the High Court held it not to be privileged, or to show it to the Judges if they desired to see it before making their order. It was ultimately decided that this report was not a judicial proceeding, and that the District Magistrate was justified in refusing to produce it.

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[7] *Swann* v. *Vines*, tried at Westminster, November, 1877.

i.e. the Code of 1872. See section 176 of the Code of 1882.

In connection with the subject of the translation of documents may be noticed section 361 of the Code of Criminal Procedure, which provides that in cases in which documents are put in for the purpose of *formal proof*, it shall be in the discretion of the Court to interpret as much thereof as appears necessary. See also *Queen* v. *Amirudin*, 7 B. L. R. 71.

Translation of documents for accused persons.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving as evidence, of document called for and produced on notice.

"The production of papers upon notice," says Mr. Taylor, "does not make them evidence in the cause *unless the party calling for them inspects them*, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue. The reason for this rule is, that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties"—(§§ 1614, 1817, 8th edn.)

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Using, as evidence, of document production of which was refused on notice.

Illustration.

A sues B on an agreement, and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

"If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind: and therefore, if he once refuses, he cannot, when his opponent has proved a copy and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness; neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce and prove it as part of his own case."

Rule of English law.

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[a] Taylor, § 1615; § 1818, 8th edn.

See sections 66 and 89, *ante;* and section 131 of the Code of Civil Procedure.

Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be revelant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

This is a most important section. Its provisions, though they may be in some respects not in accordance with English ideas, are wholly suited to the state of things which exists in India out of the Presidency-towns. In his *Introduction* to The Evidence Act subsequently published, Sir J. F. Stephen remarks:—"When a man has to inquire into facts of which he receives in the first instance very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report and facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of The Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by Police-officers or attorneys. He has to sift out the truth for himself as well as he can

and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever."

The above section applies to both civil and criminal proceedings. In criminal proceedings, however, still greater power is given to a Sessions Judge by section 298 of the Code of Criminal Procedure, which is as follows:—"It is the duty of the Judge (*a*) to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; *and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties*; (*b*) to decide upon the meaning and construction of all documents given in evidence at the trial; (*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given; (*d*) to decide whether any question which arises is for himself or for the jury; and upon this point his decision shall bind the jurors. The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Duty of Sessions Judge in criminal cases.

Illustrations.

(*a*) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.

(*b*) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed."

Civil cases are not tried with a jury in any of the Courts in India, the Judge being in all cases judge both of law and of fact, and discharging the functions of both judge and jury. Criminal cases in the Court of Sessions are tried by jury in those districts in which the Local Government has, under the provisions of section 269 of the Code of Criminal Procedure, directed that the trial of all offences, or of any particular class of offences, shall be by jury.

Under the provisions of section 120 of the Code of Civil Procedure, the Court may direct any *party* to a suit to appear in person for examination; and under the provisions of section 171 of the same Code, if the Court at any time thinks it necessary to examine *any person other than a party to the suit* and not named as a witness by a party to the suit, the Court may, of

Power of Judge to send for additional witnesses.

its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession. So under section 540 of the Code of Criminal Procedure, "any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

Power of Criminal Court to summon material witness, or examine person present

In the case of *Nur Baksh Kazi* v. *Empress* (I. L. R. 6 Calc. 279 . 7 C. L. R. 385) it was pointed out that it is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions, and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of the Act. In this case the Judge on the examination in-chief being finished had questioned the witnesses at considerable length on points to which it was to be expected the cross examination would be directed, which it was observed must have rendered the greater part of the cross-examination ineffective.

In the cases of *Tarini Charan Chaudhri* v. *Saroda Sundari Dasi* (3 B. L. R. A. C. 158) and *Empress* v. *Girish Chandra Talukdar* (I. L. R. 5 Calc. 614), it was decided that when a party to the suit or a witness is summoned by the Court, such witness is liable to be cross examined by the parties. The provisions of section 165 of The Evidence Act only forbid the cross-examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge. They apply rather to particular questions put to a witness already before the Court than to the whole examination of a witness called by the Court. See *R.* v. *Sukhram Mukundji* (11 Bom. H. C. Rep. 166). in which it was said :—"This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross examination upon answers—upon every answer given to the Court, and is subject to the Court's control." A witness is not bound under this section to answer questions put to him by a Judge with a view to criminal proceedings being taken against the witness (*Queen-Empress* v *Hari Lakshman*, I. L. R. 10 Bom. 185).

Cross-examination of witnesses called by the Court

We have seen that the law (section 298 of the Code of Criminal Procedure, *ante*, page 666) expressly makes it the duty of a Sessions Judge in criminal cases to prevent the production of inadmissible evidence, whether it is or is not *objected to by the parties.*

Should Judge in civil cases reject inadmissible evidence, if not objected to by the parties?

The duty of a Judge in civil cases is nowhere laid down so distinctly in this respect; and there may be some doubt as to whether, and, if at all, to what extent a Judge ought to interfere where no objection is raised by the parties. When the manner in which cases are prepared for trial in the majority of the Courts of original jurisdiction in the Mufassil is considered, and when it is reflected that many of the practitioners in the lower Courts have little idea of what is or what is not relevant, it will be apparent that, if the Courts themselves be passive in this respect, the utility of the Code of Evidence will be seriously impaired. Under the old law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion that the Courts had an active duty to perform in respect of the admission and rejection of evidence, and this wholly irrespective of objections emanating or rather failing to emanate from the parties or their pleaders. The Calcutta High Court laid down the following rule on one point connected with the subject:—"It will be the duty of the Judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge, or merely of those which he has heard from others; and, if the former, what are his means of knowledge."[1] In the case of *Queen* v. *Pitambar Sirdar* (7 W. R. Cr. 25), *Markby, J.*, said —"The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court." This no doubt was a criminal case, but the general direction above first quoted was addressed to all Courts, civil and criminal. Turning now to The Evidence Act, it will be found that many of its provisions tend to impose an imperative duty upon the Court. The *proviso* to the above section (165) distinctly declares that the Judge *shall* not dispense with primary evidence of any document except in the cases excepted in the Act. Section 64 enacts that "documents *must* be proved by primary evidence except in the cases hereinafter mentioned." So section 60 enacts that oral evidence *must*, in all cases whatever, be direct. Then section 5 enacts that evidence may be given of relevant facts *and of no others*. Having regard to the language of these sections and of other portions of the Act, it would appear that it was the intention of the Legislature that a Civil Court should, irrespective of objections made by parties compel observance of the provisions of the law. But what if the Court neglect its duty in this respect? In the case of an appeal, are parties themselves ignorant of the provisions of the law, and unable to procure the services of competent advisers, to suffer for the *laches* of the Court? It may be said that there is no good reason why this particular case should form an exception to the general rule—*Ignorantia juris non excusat*. There is also a distinction between cases in which evidence wholly irrelevant has been erroneously admitted, and those cases in which a relevant fact has been improperly allowed to be proved in a manner different from that which the law requires. The whole question will be found further considered in the note to section 167, *post*.

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[1] Circular No. 31 (Civil Side), dated 13th October 1863.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put questions.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial for improper admission or rejection of evidence.

This is *verbatim* section 57 of the old Act, II of 1855; and the rule has been adopted from the practice of the Courts in England. "Where evidence," says Mr. Lush, "has been offered by one party at the trial, and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that, in so rejecting or admitting the evidence, the Judge did not rule according to law. But still the Courts have not been in the habit of granting a new trial *if, with the evidence rejected, a verdict for the party offering it would be clearly against the weight of evidence; or if, without the evidence received, there be enough to warrant the verdict*, yet, unless in a very clear case, the Courts will not thus determine the effect of the improperly rejected evidence, but will direct a new trial."[2] In *R.* v. *Grant*[3] it was laid down that it is only where the evidence in question is deemed by the Court to have been admissible *for the purpose for which it was tendered at the trial*, that its rejection forms a sufficient ground for a new trial; and that a new trial will not be granted in order that evidence may be given for a purpose other than that for which it was offered, for in such case the fault lay with the party and not with the Judge. Where the fault was that of the Judge, it is evident that it would be a fruitless protraction of litigation to grant a new trial in those cases in which it is clear that the Judge's error

Rule of English law

[2] Stephen's Lush's *Common Law Practice*, 2nd edition, p. 451, quoting *Alderson B.*, in *Hughes* v. *Hughes*, 15 Meeson and Welsby's Rep. 701. See also the other cases there cited.

[3] 5 Barnewell and Adolphus's Rep. 1081.

could have had no possible effect upon the result.* It will, however, be well to bear in mind that the English cases were decided under a system different from that which prevails in India, differing more especially in this, that in England the facts are found by a jury, while in India the Judge is judge both of fact and law. Under the former system a new trial might well be granted when the effect of a particular piece of evidence upon a jury might be the subject of reasonable doubt; while under the latter the Judge can himself say what the effect would be upon his own mind. The principle of this section was applied upon appeal in *Imperatrix* v. *Pandhari-nath* (I. L. R. 6 Bom. 34) to a case tried by a Sessions Judge sitting with a jury. The High Court, after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it; and accordingly the conviction and sentence were reversed. In *Queen-Empress* v. *O'Hara* (I. L. R. 17 Calc. 642) the Judge read to the jury certain statements made by two witnesses, when examined in the lower Court as accused persons, and which had not been admitted in evidence. It was held that this was an error calculated to prejudice the prisoner and that, in the circumstances the Court was bound to exercise its powers of review. Subsequently, after a consideration of the remaining evidence, the conviction was set aside. In the case of *Queen* v. *Haribol Chandra Ghosh* (I. L. R. 1 Calc. 207), the principle was acted upon in a case which had been tried at the Sessions on the Original Side of the Calcutta High Court, and which came before a Court of Review upon the certificate of the Advocate-General (under section 26 of the Letters Patent) that a point of law should be further considered. Certain evidence, which had been improperly admitted, was rejected, and upon the evidence that remained the conviction was upheld. In *Imperatrix* v. *Pitambar Jina* (I. L. R. 2 Bom. 61), which was a case reserved under section 25 of the Letters Patent and section 101 of The High Courts' Criminal Procedure Act, X of 1875, it was held that the High Court had power to review the whole case and determine whether the rejection of evidence held to have been improperly admitted should have the effect of varying the result of the trial, so that the conviction should be reversed. See also *Regina* v. *Navroji Dadabhai*, 9 Bom. H. C. Rep. 358. In *Uma Kant Bakshi* v. *Ganga Narain Chaudhri* (20 W. R. 384), the copy of a deposition of a witness who was living taken in a proceeding before the same parties, was

* See *Wright* v. *Doe d. Tatham*, 7 Adolphus and Ellis's Rep. 330. Compare 13 and 14 Vict., cap. 36, section 45, which lays down a similar rule for Scotland. The rules of Court made under The Judicature Act in England provide that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties (Order XXXIX, Rule 6).

improperly admitted in evidence. But there being other evidence sufficient to justify the decision, this was not held to be ground of itself for a new trial. In *Queen Empress v. Nand Ram*, I. L. R. 9 All. 609, copies of depositions given at a previous trial were read out to the witnesses who were then cross examined by the prisoners. It was held that this procedure was irregular, but that the irregularity was cured by the provisions of section 537, Criminal Procedure Code, and of this section, as it was not shown that there had been any failure of justice, or that the accused had been substantially prejudiced, and as the matters elicited in cross-examination were sufficient to sustain the conviction. In *in the matter of the petition of Jhabu Mahton*, I. L. R. 8 Calc. 739; 12 C. L. R. 233, irregularities in the selection of the jurors, and in the admission of the deposition of a medical witness, it not being shown that the prisoners had thereby been prejudiced, were held not to be objections which would justify an interference with the verdict.

In the case of *Mohar Singh v. Gharibu*, 6 B. L. R. 495: 15 W. R. P. C. 8, the following observations were made by the Privy Council:—"It seems to their Lordships that, giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country before which, on a motion for a new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not judges of fact, and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. *But it is the duty of their Lordships, who are judges of the fact, in such a case as this, to consider whether throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees.*" See also *Lalla Bansidar v. The Government of Bengal* (9 B. L. R. 371. 14 Moo. I. A. 86; 16 W. R. P. C. 11), and *Bommaranzi v. Rangasami Mudali* (6 Moo. I. A. 232). In these words of their Lordships of the Privy Council is indicated very clearly what is the duty of a Court sitting in *first* (under the old Code, *regular*) appeal, and therefore competent to deal with both facts and law, when evidence has been improperly admitted by the Court of first instance. *It should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to support the decree.*[a] Where the evidence which

Duty of Appellate Court, when evidence has been improperly admitted by Court of first instance.

[a] Compare section 578 of the Code of Civil Procedure, which enacts, that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect, or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court. Similar provisions are contained in section 537 of the Code of Criminal Procedure.

is to be so thrown aside is wholly irrelevant, the case is sufficiently clear. The decree can be supported upon relevant evidence only; and if, after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed. The party who is thus defeated may say that if he had known that the evidence given would have been insufficient for the purpose, he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the following observations of their Lordships of the Privy Council in the case of *Nitresar Singh* v. *Nand Lall* (8 Moo. I. A. 199; 1 W. R. P. C. 51):—"The learned counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remanding the case for re-trial. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favor by the Principal Sadr Amin affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sadr Court was right in treating the cause as ripe for final decision. The appellant had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues, if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance or with his consent. *And the suspicion, however probable, of the Judge that a party, who has failed to prove his case, may be more successful on a second and fuller investigation is no sufficient ground for directing a new trial.*" In *Umesh Chandra Chatterji* v. *Chandi Charan Rai Chaudhri*, (I. L. R. 7 Calc. 293,) the applicability of the principle to *second* appeals was considered, and an opinion was expressed that, after excluding the evidence improperly admitted, the High Court could not proceed to deal with the case upon the evidence that remained, but should remand it for the purpose of being dealt with by the lower Court—that the only cases which could properly be disposed of without a remand are those in which, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds.

Relevant fact improperly proved.

But there is another class of cases, namely, those in which a fact relevant in itself has been erroneously allowed to be proved in a manner not permitted by the law; as for example, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for. The rule in England is that, unless the opposite party objected to this evidence at the time that it was offered, he cannot object afterwards; and in accordance with this rule, it has been held more than once by the Calcutta High Court, that it is not competent to an Appellate Court sitting in regular appeal to reject the *copy* of a document, to the admission of which by the Lower Court no objection was made by any of the parties, although the original was not

produced or its non-production not accounted for. In dealing with such a case under the present Act, it will, as already observed, be necessary to consider the effect of "must" in section 64, *ante*, and of the second proviso to section 165, *ante*, which enacts that a Judge *shall not* dispense with primary evidence of any document, except in the cases excepted by the Act.

However, where a copy of a copy was admitted in evidence in a Court of first instance without objection being taken to its admission, it has been held under this Act by the Bombay High Court that it is not within the province of the Appellate Court to raise or admit an objection to it in appeal: *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*, I. L. R. 11 Bom. 320. The same rule has been laid down by the Calcutta High Court in *Akbar Ali* v. *Phyea Lal Jha*, I. L. R. 6 Calc. 666; 7 C. L. R. 497. See *ante*, p. 387.

The effect of a compulsory Registration Law has been considered, *ante*, page 443 and following pages. It remains to make a few remarks about The Stamp Act.

Unstamped or insufficiently stamped documents.

Where documents required by law to be stamped were received by a Court of first instance without a stamp or without a sufficient stamp, it was held that it was not competent to an Appellate Court to reject them (*Lalji Singh* v. *Akram Ser*, 3 B. L. R. 235—Unstamped receipts), or on this account to reverse the decision of the Lower Court[6] (*Mark Ridded Currie* v. *Mutu Ramin Chetty*, 3 B. L. R. 130 *Afzalunissa* v. *Tej Ban*, I. L. R. 1 All. 725). These cases proceeded on the ground that the error of receiving a document insufficiently stamped or without a stamp did not affect the merits of the case or the jurisdiction of the Court,[7] although it might affect the Government revenue. They were decided under the old Stamp Acts, X of 1862 and XVIII of 1869 and are somewhat remarkable, having regard to the imperative provisions of section 14[8]

[6] Compare section 31 of *The Common Law Procedure Act*, 1854 (17 & 18 Vict. cap. 125), which enacts that "no new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

[7] In *Haran Chandra Bhuri* v. *Rasik Chandra Neogi* (20 W. R. 63) it was said that when a lost deed is shown not to have had a stamp, it may be right for a Court to require, before admitting secondary evidence, that the same penalty be paid as would have been paid if the unstamped deed itself were produced; but if the Court, without doing this, allows secondary evidence to be given of the contents of the document, this is not an error which affects the merits of the decision and which a person can take advantage of in special appeal.

[8] See also the following cases —*Kalicharan Das* v. *Nabo Krishto Pal*, 9 C. L. R. 272 (The only question when a document is tendered in evidence is does it *then* bear a proper stamp. The Court is not bound or indeed at liberty to allow parties to show at what time it was stamped) —*Nur Bibi* v. *Ramzan*, 24 W. R 198 (Similar). *Khub Lal* v. *Jangal Singh*, I. L. R. 3 Calc. 787 (No appeal on ground of principal document being insufficiently stamped:—*Champabati* v *Bibi Jiban*, I. L. R. 4 Calc. 213 (Appellate Court not competent to direct reception of insufficiently stamped document, unless duty and penalty were tendered in Court of first instance and rejected) :—*Golap Chand Marwari* v. *Mohokum Kuari*, I. L. R. 3 Calc. 314: 2 C. L. R. 412 (Promissory note not stamped: independent evidence of consideration admissible) :—*Sennandan* v. *Kollakiran*, I. L. R. 2 Mad. 208

of the former Act, which directed that no instrument chargeable with stamp duty should be received in any Court of Justice as creating, transferring or extinguishing any right or obligation, or as evidence in any civil proceeding, or *should be acted upon* in any such Court or by any public officer, *unless duly stamped* as required by the Act. This language was not less imperative than that of The Registration Act (see section 49 thereof, *ante*, pages 445 and 451), upon which a very different construction has been put. But see *Tetai Abom* v. *Gagai Gura Chawa* (3 B. L. R. App. 30), in which, however, the document had been objected to in the Court of first instance; and the remarks of *Couch, C. J.*, in *Ankur Chandra Rai Chaudhri* v. *Madhab Chandra Ghosh* (21 W. R. 1.) Section 34 of the present Stamp Act, I of 1879, enacts, that "no instrument chargeable with duty shall be admitted in evidence for any purpose, by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped." Every such instrument may, however, be admitted in evidence on payment of the duty or deficient duty together with a penalty of five rupees; and instruments, though unstamped or insufficiently stamped, may be admitted in evidence in proceedings in Criminal Courts, other than proceedings concerned with the possession of land or the maintenance of wives and children. When an instrument has once been admitted in evidence, such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped; but any superior Court of Appeal or Reference may, of its own motion, or on the application of the Collector, declare an instrument liable to the payment of duty and a penalty, or a higher duty and penalty; and the Collector can enforce such declaration (section 50).[9]

Evidence admitted at an improper stage of case.

Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party has been prejudiced by this course (*Doe d. Nicholl* v. *Bower*, 16 Adolphus and Ellis's Rep. 805: *Tota Ram* v. *Rikmoni Ballab*, 13 Moo. I. A. 83). It would seem that, if an Appellate Court receive additional evidence without recording the reasons for the admission thereof, as

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Secondary evidence of mortgage deed, retained by opposite party after notice to produce, held admissible in the absence of evidence to show that it was unstamped when last seen):—*Mathura Mohan Rai* v. *Piyari Mohan Saha*, I. L. R. 4 Calc. 259 (Insufficiently stamped *hundis* not admissible on payment of penalty):—*Kunhaya Lal* v. *Stowell*, I. L. R. 3 All. 581 (Document, inadmissible as promissory note insufficiently stamped, admitted as an acknowledgment of a debt):—*Krishnasami* v *Rangasami*, I. L. R. 7 Mad. 112 (suit for money lent, secured by unstamped promissory note, not admitted in evidence, not barred).

[9] In *Ramasami Chetti* v. *Ramasami Chetti* (I. L. R. 5 Mad. 220), decided under the present Stamp Act and the present Code, the principle of the former cases was followed, and the objection in appeal that an unstamped *hundi* had been improperly admitted was held to be an objection not affecting the merits of the decision.

required by section 353 of the old (section 568 of the new) Code of Civil Procedure, such evidence so received is to be regarded as improperly admitted (*Jagadindra Banwari Gobind v. Bhabatarini Dasi*, 5 B. L. R. App. 54).

Improper rejection of evidence.

Turning now to the case in which evidence properly receivable has been offered and improperly rejected, the rule here is, that the improper rejection is not of itself to be a ground for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, if the rejected evidence had been received, it ought not to have varied the decision. If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision, it does not follow that such Court should in every case proceed at once to reverse the decision of the lower Court. It is competent for the superior Court, and in most cases it would be proper to proceed in the manner provided for by section 568 of the Code of Civil Procedure, which is as follows :—

Production of additional evidence in Appellate Court.

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (*a*) the Court against whose decree the appeal is made refused to admit evidence which ought to have been admitted, or (*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,[1] the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined. Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission."

The above section of The Indian Evidence Act has been so far considered in connection with the Courts of Appeal, to which the words "reversal of any decision" indicate its applicability, inasmuch as Courts of Appeal have power to reverse the decisions in respect of which appeals are preferred. With regard to a *new trial* it is to be observed that the Code of Civil Procedure does not provide for a new trial in civil cases. Sections 623 to 630 of this Code provide for a *review of judgment*: and section 630 enacts that, when an application for a review of judgment is granted, the Court may at once *re-hear* the case, or make such order in regard to the *re-hearing* as it thinks fit. By this "re-hearing" is understood, according to the practice of the Courts, a re-arguing and reconsideration of the case, after receiving the additional evidence, the discovery of which since the former trial was the ground of admitting the review. It may be observed that the terms "review" and "re-hearing" are borrowed from the practice of the Courts of Chancery in England.[2] A *new trial* is provided for by section 37

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[1] As an instance where additional evidence was received in a divorce case, see *Morgan* v. *Morgan*, I. L. R. 4 All. 306.

[2] On the subject of reviews the following cases may be usefully referred to:—*Amrao Thakur* v. *Gokul Mandal*, 8 B. L. R. App. 34 (Review not to

of Act XV of 1852, applicable to the Presidency-Towns. Under The Provincial Small Cause Courts Act, IX of 1887, a review of judgment can be applied for, but not a new trial. Under the provisions of sections 38 and 39 of the former Act, a suit decided by the Small Cause Court, and in which the amount or value of the subject matter exceeds one thousand rupees, can in certain cases be *re-heard* by the High Court. In criminal cases an Appellate Court may, if it see fit, order the appellant to be *re-tried* (section 423 of the Code of Criminal Procedure). The High Court, in the exercise of its powers of revision, may exercise any of the powers conferred on a Court of Appeal, including the power of ordering a new trial (section 439).

Some other cases.

In the case of *Tota Ram* v. *Rikmani Balab* (13 Moo. I. A. 83) their Lordships of the Privy Council said that they had not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted; that it had always been the rule of the Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the Court below came.

The High Courts, upon the hearing of second or special appeals,* have remanded cases for reconsideration and a fresh decision by the lower Appellate Court—where important evidence had not been carefully

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be granted without proof of the truth of the ground on which it is asked): —*In the matter of the petition of Chintamani Pal* (Full Bench), 6 B. L. R. 126 (Raising of new point which had not been discussed at the original hearing —*In the matter of the petition of Jadunath Mukharji*, 6 B. L. R. 333 (Cannot be admitted by Lower Appellate Court after a special appeal:—*Bihari Lall Nandi* v. *Trailakha Mayi Barmani*, 3 B. L. R. 346 (Grounds for admitting) —*Moheshar Singh* v. *The Bengal Government*, 7 Moo. I. A. 394 (Distinction between *review* and *appeal*) —*Ghulam Hosen* v. *Akhai Kumar Ghosh*, 3 W. R. Act X 169 (Judge improperly granting review of predecessor's judgment), —*Bhairab Chandra Sarmah Chaudhri* v. *Madhab Ram Sarmah* · 11 B. L. R. 423; 20 W. R. 84 (Appeal allowed when no enquiry or proof that new evidence could not have been produced at original trial) —*Fakir Das Bera* v. *Fakir Das Bera*, 20 W. R. 180 (Power to grant strictly limited by the provisions of the Code): *Sheo Ratan* v. *Lappu Kuar*, 1 L. R. 5 All. 14 (Grounds not of *review* but of *appeal*):—*Harbans Sahai* v. *Thakur Pershad*, I. L. R 9 Calc. 209; 12 C. L. R. 64 (Discretion of Court to re hear whole case, or particular point merely) —*Mahadeva Rajar* v *Sappani*, I. L R. 1 Mad. 306 (Omission to consider important documentary evidence a ground of review).—*Reasat Hosen* v. *Abdula*, I. L. R. 2 Calc. 131 · I. L. R. 3 I A. 221 (Review though no error in law and no discovery of fresh evidence):—*Raman* v. *Karunatha Tharakan*, I. L. R. 2 Mad. 10 (Review by successor) —*Jammanjai Mallik* v. *Dasmani Dasi*, I. L. R. 8 Calc. 700:—*Modan Mohan Poddar* v. *Purna Chandra Purbat*, I. L. R. 10 Calc. 297 (Review or new trial in Provincial Small Cause Court) *Raffan Krishn Poddar* v. *Raghunath Saha*, I. L. R. 8 Calc. 287: 10 C. L. R. 275. *Vellaya* v. *Jaganatha*, I. L. R. 7 Mad. 307 (How far a new ruling entitles to a review): *Amrit Lal* v. *Madho Das* I. L. R. 6 All. 29 (The same).

* See section 372 of the old, and section 584 of the present, Code of Civil Procedure. For an account of the origin, &c., of "special appeals," see pages 178-181 of the Introduction to the Author's edition of the *Bengal Regulations*. The term "special appeal" is not used in the present Code, which speaks of "second appeals" and "appeals from appellate decrees."

considered by such Court (*Digambari Dasi* v. *Kissen Dhar Nandi*, 1 Jur. N. S. 35) :—where the judgment of the lower Appellate Court was based on part of the evidence only (*Shandhaban Mohant* v. *Sarat Chandra Rai* 23 W. R. 160 : *Abdul Rahman* v. *Sofy Mikhayesh Saheba*, 24 W. R. 293) :—where the importance of a particular piece of evidence had been much underrated (*Sarasati Dasi* v. *Ambika Nand Biswas*, 24 W. R. 192) :— where witnesses were discredited for general reasons not affecting the credit of any individual deponent (*Sheo Parshan Panday* v. *Brun Panday*, 24 W. R. 251) :—where the Judge of the lower Appellate Court had not recorded his judgment in the manner required by law, *viz.*, section 359 of the old (section 203 of the new) Code of Civil Procedure, which requires that the judgment contains the point or points for determination, the decision thereupon, and the reasons for such decision (*Tatur Khawas* v. *Jagannath Persad*, 7 B. L. R. App. 14 ; and see *Kristo Gobind Kar* v. *Ganga Persad Sarma*, 23 W. R. 266) :—where the lower Appellate Court had otherwise dealt with the evidence in an improper manner (*Rup Naraini Kúwar* v. *Ressal Tewari*, 24 W. R. 119) : *Chand Mani Dasi* v. *Abhai Charan Mal*, 24 W. R. 289 : *Amiran* v. *Cherág Ali*, 24 W. R. 343, *Ramdas Saha* v. *Manmahini Dasi*. 7 B. L. R App. 4 : *Basti Sahu* v. *Jeo Narain Singh*, 24 W. R. 338 : *Hansa Koer* v *Sheo Gobind Raút*, 24 W. R. 431 : *Guni Biswas* v. *Srigopal Pal Chaudhri*, 8 W. R. 395) :—where a fact had been found by the lower Court upon evidence, part of which was inadmissible (*Girúdas De* v. *Sambhúnath Chakravatti*, 3 B. L. R. 258) :—where the judgment showed on the face of it want of due consideration of the evidence and the introduction of extraneous matter (*Surjo Kanth Acharjya* v. *Khudi Narain Manna*, 22 W. R 9) :—where the judgment of the lower Court mis-stated the most importan facts (*Purna Chandra Chatarji* v. *Chandra Kumar Rai*, 24 W. R. 171) :—where relevant evidence was considered to be no safe guide, and treated as worthless without being disbelieved (*Haro Prasad Rai* v. *Umatara Debi*, I. L. R. 7 Calc. 263 : 8 C. L. R. 449). It was held to be an error in law within the meaning of section 372 of the old Code of Civil Procedure, when th lower Court found on no evidence or on what was not legal evidence (*Ram Sudhan Sirkar* v. *Kistobag Bag*, Marsh. Rep. 322)—when secondary evidence was improperly admitted in the place of primary (*Chandra Kant Ghosh* v. *Saudamani Debi*, 9 W. R. 517)—when the lower Court dealt improperly with presumptions of law (*Surnamayi* v. *Luchnipat Dugar*, 9 W. R. 338) :—or with presumptions of fact (*Nilatachi* v. *Verikatachala Madali*, 1 Mad. H. C. Rep. 139).

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* See also the following cases :—*Gopal Khundi Rao* v. *Deoki Nandan*, 9 N.-W. P. Rep. 172 (Discretion properly or improperly exercised by lower Court) :—*Shib Sahai Singh* v. *Narsingh Lal*, 22 W. R. 352 (Cases may not be decided in special appeal upon a point not raised, tried or considered below) :—*Tara Prasanno Mazumdar* v. *Bissonath Sirkar*, 23 W. R. 144 (cannot be contended in special appeal, which of the two lower Courts is right, when they differ as to facts) :—*Himmat Ali Khadim* v. *Niyamatulla Khadim*, 23 W. R. 250 (Construction of depositions of witnesses not a question of law).

The Privy Council have, however, in recent cases repeatedly pointed out that in second appeal the finding of the lower Courts cannot be interfered with, however erroneous they may appear to be, unless there be an error or defect in procedure,—provided they had before them evidence proper for their consideration in support of their findings; *Ananga Manjari Chaudhurani* v. *Tripura Sundari Chaudhurani*, I. L. R. 14 Calc. 740: L. R. 14 I. A. 101: *Pratab Chandra Ghosh* v. *Mohendro Nath Purkhait*, I. L. R. 17 Calc. 291: L. R. 16 I. A. 233: *Durga Chaudhurani* v. *Jowahir Singh*, I. L. R. 18 Calc. 23: L. R. 17 I. A. 122: *Ram Ratan Sukal* v. *Nandu* I. L. R. 19 Calc. 249: L. R. 19 I. A. 1: and *Ram Gopal* v. *Shams Khatun*, I. L. R. 20 Calc. 93. The cases of *Futtehma Begam* v. *Mahomed Ausar*, I. L. R. 9 Calc. 309, and *Nivath Singh* v. *Bhikki Singh*, I. L. R. 7 All. 649, in which the contrary was held, have been expressly overruled. But a finding without evidence to support it is a substantial error in the proceedings and a good ground for second appeal: *Hemanto Kumari Debi* v. *Brajendro Kishor Rai Chaudhri*, I. L. R. 17 Calc. 875: L. R. 17 I. A. 65:

The duties of Criminal Courts exercising appellate jurisdiction are defined n sections 423 and 537 of The Code of Criminal Procedure, Act X of 1882.

SCHEDULE.

ENACTMENTS REPEALED.

[*See section* 2.]

Number and year.	TITLE.	Extent of repeal.
Stat. 26 Geo. III, cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled 'An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies'), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies.

SCHEDULE—ENACTMENTS REPEALED—(*Continued.*)

Number and year.	TITLE.	Extent of repeal.
Stat. 14 & 15 Vict., cap. 99.	To amend the Law of Evidence ...	Section 11 and so much of section 19 as relates to British India.
Act XV of 1852 ...	To amend the Law of Evidence ...	So much as has not been heretofore repealed.
Act XIX of 1853 ...	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section 19.
Act II of 1855 ...	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861 ...	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section 237.
Act I of 1868 ...	The General Clauses Act, 1868 ...	Sections 7 and 8.

ACT No. XVIII OF 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 1st October 1891.)

An Act to amend the Law of Evidence with respect to Bankers' Books.[5]

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' Books; It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called the Bankers' Books Evidence Act, 1891.

(2) It extends to the whole of British India; and

(3) It shall come into force at once.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "company" means a company registered under any of the enactments relating to companies from time to time in force in British India, or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent:

(2) "bank" and "banker" mean—

(*a*) any company carrying on the business of bankers,

(*b*) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

[5] In the Statement of Objects and Reasons of the Bill of this Act it was stated that the object of the Bill was to apply to British India the provisions of The English Bankers' Books Evidence Act, 1879 (42 & 43 Vict., c. 11), under which copies of entries in bankers' books were made receivable in evidence under certain conditions—See *Harding v. Williams*, L. R. 14 Ch. D. 197.

"(c) any post office, savings bank or money order office:"[6]

(3) "bankers' books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank:

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration:

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken:

(6) "Judge" means a Judge of a High Court:

(7) "trial" means any hearing before the Court at which evidence is taken: and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

Power to extend provisions of Act.

3. The Local Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

Mode of proof of entries in bankers' books.

4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as

[6] This clause was added to this sub-section by Act I of 1893, (The Bankers' Books Evidence Act, 1893,) which received the assent of His Excellency the Governor-General on the 20th January 1893.

prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

Case in which officer of bank not compellable to produce books.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

Inspection of books by Court or Judge.

6. (1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

Costs.

7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

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